

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC
LABORATORIES, L.L.C.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,**

Respondents.

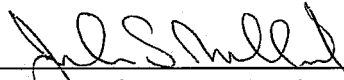
Docket No. 9318

**SUBJECT TO
PROTECTIVE ORDER**

**COMPLAINT COUNSEL'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTARY MATERIALS
AND ANSWERS TO INTERROGATORIES**

Pursuant to RULES OF PRACTICE 3.22 and 3.38(a), Complaint Counsel respectfully move for an *Order* compelling the production of documentary materials and answers to interrogatories responsive to Complaint Counsel's *First Request For Production of Documentary Materials and Tangible Things* and *First Set of Interrogatories* to Respondents. This motion is supported by the accompanying *Memorandum*, RULE 3.22(f) Statement, and proposed *Order*.

Respectfully submitted,



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Division of Enforcement

Bureau of Consumer Protection

Federal Trade Commission

601 Pennsylvania Ave., N.W.

Washington, D.C. 20580

Counsel Supporting the Complaint

Dated: December 6, 2004

UNITED STATES OF AMERICA
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OFFICE OF ADMINISTRATIVE LAW JUDGES

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SUBJECT TO
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**COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION
TO COMPEL PRODUCTION OF DOCUMENTARY MATERIALS
AND ANSWERS TO INTERROGATORIES**

Complaint Counsel respectfully submit this *Memorandum* in support of our *Motion to Compel Production of Documentary Materials and Answers to Interrogatories*. The *Motion* and *Memorandum* concern Complaint Counsel's very first set of discovery requests, which seek documents and information highly relevant to our case-in-chief.¹ After protracted negotiations, Respondents have declined to turn over all evidence and information responsive to our first discovery requests. Respondents' continued failure to fully comply with our early discovery requests is wholly unjustified. For the reasons set forth below, this Court should issue an *Order* compelling Respondents to fully comply with these document requests and interrogatories.

BACKGROUND

On June 15, 2004, the Commission filed the *Complaint* in this matter, alleging, *inter alia*,

that Basic Research LLC and other related individuals and companies (collectively, "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"). Respondents have denied these allegations. *See, e.g., Answer, Resp't Basic Research at 1-12 (July 30, 2004).*

I. Staff Investigation: Documents Received and Instructions Given

The Commission issued the *Complaint* after a staff investigation. As in many other Section 5 and 12 cases, significant evidence concerning Respondents' business practices lies within the primary or sole possession, custody, or control of Respondents. During the course of the staff investigation, in February 2001, the staff sent an access letter to Basic Research LLC requesting documents and answers to questions. Later, in February 2002, the Commission issued a set of *Civil Investigative Demands* ("CIDs") to Basic Research LLC. The staff provided Respondents with specific instructions regarding the retention of evidence relating to the matter. We received responsive documents from Basic Research in 2001 and 2002, and in 2003, Basic Research volunteered other documents in defense of its practices.

During the pre-*Complaint* investigation, the staff corresponded with Respondents' counsel concerning Respondents' obligation to retain documents relating to the Commission's inquiry. In response to concerns expressed by Respondents about the burden of retaining evidence relevant to this inquiry, the staff provided additional written instructions concerning the specific types of documents that Respondents were required to retain. These instructions were set forth in letters between Respondents' counsel and the Associate Director of the Division of Enforcement. *See Letter from Stephen Nagin to Walter C. Gross (Apr. 28, 2002) and Letter from Associate Director*

Elaine D. Kolish to Stephen Nagin (May 3, 2002) (both attached hereto as Ex. A). The FTC staff instructed Respondents to retain emails and interoffice messages, business development documents, customer service documents, and electronic copies of privileged documents. See Ex. A (Letter to Respondent's Counsel at 1-2). With respect to Marketing Department documents, we strongly emphasized that Respondents "must not dispose of these documents." *Id.*

Some of the materials produced during the investigation related to products identified in the *Complaint* ("challenged products"), but many others did not.² Additionally, by June 2004, these documents were many months old. Accordingly, at the outset of this case, Complaint Counsel undertook written discovery focused on the products and Respondents identified in the *Complaint*.

II. Respondents' Discovery Responses: Protracted, Redacted, Padded, and Incomplete

On June 25, 2004, Complaint Counsel served discovery requests on Respondents. Service of these requests occurred before Respondents' counsel entered their *Notices of Appearance*. Our first requests consisted of a *First Request for Production of Documentary Materials and Tangible Things* ("Document Request"), and a *First Set of Interrogatories* ("Interrogatories"). These requests, attached hereto as Exhibits B and C, respectively, were our highest priority discovery requests. We issued no further requests to Respondents over the

² During the course of the investigation, Respondents produced advertisements, product packaging, product substantiation, sales data, and/or other documents for many products not referenced in the Commission's *Complaint*, including but not limited to the following: Aprinol, Breast Augmentation Serum, CarboLean, Glucostart, Lip Plumper, Lipopeptide-Y, Luprinol, MetaBolics Plus, Oxy Caps, Rapid Weight Loss System, Testrogel, ThermAdril, ThermoGenics Plus Stimulant Free System, ThermoGenics Plus Zhi Shi, and Thyrostart.

following three months.³

Respondents have taken many months to provide documents to Complaint Counsel in compliance with our initial discovery requests. Several weeks of this delay resulted from the fact that, following the filing of Respondents' *Notices of Appearance*, Complaint Counsel extended Respondents several extensions of time as a courtesy to their counsel. On August 9th, over six weeks after service of our discovery requests, we received product samples. Later, on or about August 18th, we received seven boxes of documents. When we raised questions about the scope of the document production on August 23rd, Respondents' counsel advised us that the production was not complete and that other boxes would be forthcoming. We later received two boxes on September 9th. Subsequent discussions led to the production of CD-ROM discs containing documents on October 27th, November 16th, and most recently on November 18th. The November 18th production, which Respondents mailed several days earlier, consisted of over 10,000 pages of documents. *See* Ex. D at 1 (photocopy of CD-ROM disc bearing date of November 16, 2004, and identifying contents as consisting of over 10,000 pages).

As fully discussed in this *Memorandum*, Complaint Counsel have *not* received all documents and information responsive to our first requests. Complaint Counsel have, in the past two weeks, fully reviewed the recently-produced documents, identified the remaining issues and

³ On October 14th, Complaint Counsel served Respondents with a *Second Request for Production of Documentary Materials and Tangible Things*. Respondents have refused to provide any responsive documents or information other than documents generically described in their *Initial Disclosures*. We are continuing to discuss this *Response* with Respondents, whose refusal to provide responsive documents hinges in part on their interpretation of the discovery limits established in the Court's *Scheduling Order*. The Court has clarified that Complaint Counsel have sixty document requests and interrogatories with respect to *each* Respondent. Accordingly, we have asked Respondents to fully answer our recent discovery requests.

outstanding documents, and attempted to discuss the issues with Respondents. Respondents' counsel advised us on Monday, November 29, 2004, that an impasse existed with respect to certain documents. Complaint Counsel then advised that Respondents would have until Monday, December 6, 2004, to deliver the remaining documents and information responsive to our first discovery requests. *See* RULE 3.22 Statement (appended hereto). Respondents did not deliver additional materials by that date, and in view of the protracted production to date, it is now our view as well that an impasse exists.

Respondents have performed, by their own admission, a "limited" search for material responsive to our discovery requests. As the Corporate Respondents stated in their *Response* to our first *Document Request*:

Respondents will conduct a reasonable search, limited to those locations and files where Respondents deem it reasonably likely that responsive documents will be found without undue burden, for documents responsive to those Specifications to which Respondents do not object.

Resp'ts' Resp. to 1st Req. for Prod. at 2 (attached hereto as Ex. D).⁴ Complaint Counsel have repeatedly requested, both orally and in writing, that Respondents explain the scope of their search and identify facts supporting their contention that a complete search of their common business headquarters would be unduly burdensome. *See* Letter from Compl. Counsel to Respondents' Counsel (Sept. 22, 2004), at 7 (attached hereto Ex. E). Respondents have refused to answer these questions.

⁴ As Respondents pledged to perform a "limited" search "for documents responsive to those Specifications to which Respondents do not object," *see id.* at 2, it is not entirely clear what sort of search Respondents have performed in response to *Requests* 2, 3, 6, 7, and 11, which did draw objections. *See id.* at 4-8; *see also infra* pages 8-24 (discussing requests).

Respondents have produced approximately 50,000 pages to Complaint Counsel, but the number of documents produced is, in our view, and for the reasons fully discussed below, *not* indicative of full compliance with our requests. Respondents packed their document production with many thousands of pages of surplusage while failing to produce all responsive documents.⁵ All of the produced documents have come from just two Respondents—Basic Research LLC and BAN LLC. The remaining seven Respondents—A.G. Waterhouse, Klein-Becker USA, Nutrasport, Sovage Dermalogic Laboratories, Dennis Gay, Daniel Mowrey, and Mitchell K. Friedlander—have produced *no* documents whatsoever.⁶

Disturbingly, Respondents have redacted information from the sole surviving copies of many documents that were never identified as containing any privileged information.

⁵ Complaint Counsel advised Respondents that they were *not* required to resubmit documents previously produced. *See* Instruction 6, 1st Req. at 4 (attached as Ex. B). Nevertheless, Respondents decided to resubmit literally thousands of documents, in a variety of ways. First, Respondents resubmitted thousands of pages of purported substantiation not merely once, but twice or more. *See, e.g.,* Ex. F at 1-9 (front pages of Johannes Prins et al., *Regulation of Adipose Cell Number in Man*, 92 J. CLINICAL SCI. 3-11 (1997)) (previously-submitted item that was resubmitted nine additional times, bearing new Bates numbers R0000736-R0000744, R0000795-R0000803, R0000843-R0000851, R0001309-R0001317, R0001368-R0001376, R0001416-R0001424, R0015094-R0015102, R0015153- R0015161, and R0015202- R0015210). Respondents resubmitted more than a hundred studies and book excerpts of varying lengths with changed Bates numbers. Next, Respondents resubmitted over *five thousand* pages of previously-submitted documents related to PediaLean. And most tellingly, Respondents volunteered another *five thousand* pages of refund data—*line-item* refund data for individual consumers—instead of answering a straightforward interrogatory requesting the “*total* amount of refunds to consumers . . . for each of the challenged products.” *See* Ex. F at 10 (single-page excerpt of approximately 5,000 pages of data served in response to Interrogatory 10). These examples illustrate how Respondents have inflated their document production without providing material documents. None of these many thousands of pages of surplus documents are responsive to the discovery requests addressed here.

⁶ Curiously, Respondents did not admit this fact in their *Response* to our *Document Request*, Exhibit D hereto, but they conceded this fact in later correspondence. *See* Letter from Respondents’ Counsel to Complaint Counsel (Oct. 8, 2004) at 4 (attached hereto as Ex. G).

Respondents have even “blacked out” contact information for advertising agencies and consumers who wrote to complain about Respondents’ advertisements. *See* Ex. H (providing examples of redacted documents); Ex. G at 3 (letter from Respondents’ counsel admitting that “there is no access to un-redacted originals of consumer inquiries and complaints”).

III. Extensive Negotiations Leading to this *Motion to Compel*

As set forth in the attached RULE 3.22(f) Statement, Complaint Counsel and Respondents have negotiated at great length concerning Respondents’ obligation to furnish all documents responsive to our first discovery requests. The parties have resolved numerous issues with Respondents’ oft-delayed discovery responses, and Complaint Counsel have repeatedly conferred with Respondents in an attempt to narrow and resolve the remaining issues. However, the parties have been unable to resolve these issues.

Last Monday, Respondents advised Complaint Counsel, for the first time to our recollection, that negotiations were at an impasse with respect to several of our initial discovery requests. According to Respondents’ counsel, this impasse occurred months ago with respect to some requests. As detailed in our extended RULE 3.22(f) Statement, attached hereto, this contention has no merit whatsoever. Complaint Counsel now move to compel the production of the remainder of documents and information responsive to our first discovery requests.

DISCUSSION

I. Respondents Have Unjustifiably Failed to Produce Material, Relevant Evidence In Response to Complaint Counsel’s *First Request for Production of Documents*

Assuming that Respondents preserved all of the evidence in accordance with our instructions, Complaint Counsel is entitled to all non-privileged documents responsive to our

Document Requests, as further discussed below.

A. Complaint Counsel Have Requested Relevant Documents

The Commission's RULES OF PRACTICE provide that "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." RULE 3.31(c)(1).

"Information may not be withheld from discovery . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* This RULE "adopt[s] a liberal approach to discovery." *In re Chain Pharmacy Ass'n*, Docket No. 9227, 1990 WL 606400 (June 20, 1990). However, the RULE does not have to be construed liberally here. There are substantial grounds to issue an *Order* compelling Respondents to produce all non-privileged documents and information responsive to our first discovery requests.

Unlike Respondents, whose discovery requests often sought evidence relating to defenses that were wholly improper in some cases, our first discovery requests are clearly relevant to the questions raised in the *Complaint*. Our requests are calculated to lead to the discovery of admissible evidence concerning, *inter alia*, whether Respondents operated as a common business enterprise, whether they made the representations alleged in the *Complaint*, whether those representations were material, and whether those representations were misleading and warrant the relief demanded in the *Complaint* and described in the *Notice Order*. Our June 25th *Document Request* seeks materials directly relevant to these questions. It requests, *inter alia*, the draft and final promotional materials for the challenged products, documents referring to those promotional materials, the marketing of the challenged products, product endorsers or

testimonialists, and materials relating to Respondents' corporate structure.⁷ These *Requests* address the some of the most important issues in our case-in-chief.

Respondents have not produced all of the responsive documents. In some cases, they have altogether failed to produce any responsive documents, even though we have been able to confirm, from independent investigation and some discovery obtained from third parties, that such documents have existed. We gave Respondents very specific instructions to retain relevant evidence, and they have independent legal obligations of their own in this regard. As discussed below, Respondents' decision not to produce all responsive documents is completely unjustified.

**1. Respondents Have Not Produced
All Draft and Final Promotional Materials
[Specification 2]**

Specification 2 of the *First Request for Production* seeks "all promotional materials for the challenged products, whether in draft or final form." Req. for Prod. at 6.

Respondents pledged to produce responsive documents. *See, e.g.*, Resp'ts' Resp. at 4:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents' obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).⁸

As discussed above, Respondents have refused to explain what sort of "reasonable search" they

⁷ Our *Interrogatories* seek similar information about Respondents' income and expenditures on the promotion of the challenged products, the work that they performed in creating and promoting those products, and the steps they have taken to alter their advertising practices this year, in light of the recent FDA ban on sales of ephedra.

⁸ Respondents "general objection B" denotes their statement that they will perform a "limited" search. *See supra* page 5. As previously noted, this objection is completely opaque. Respondents have refused to explain the factual basis for the objection to Complaint Counsel.

have performed. Respondents did submit print ads and point-of-purchase promotional materials, and in late October, at Complaint Counsel's urging, they finally produced television ads, some radio ads, and a small sample of draft ads. It is clear, however, that Respondents' "reasonable search" has *not* resulted in the production of all materials responsive to Specification 2.

Respondents have not produced all draft promotional materials. Nor have they produced all radio promotional materials. Nor have Respondents produced all final Internet promotional materials. These types of evidence are highly relevant to the advertising issues in this case, and Respondents should be compelled to perform a complete search and produce all of this evidence.

i. Draft Promotional Materials

Draft promotional materials are unquestionably relevant to this case. *See, e.g., In re Natural Organics, Inc.*, Docket No. 9294, 2001 FTC LEXIS 31, *1-3 (Mar. 15, 2001) (attached hereto as Ex. I) (ordering production of draft and non-disseminated advertisements, which are relevant in numerous respects); *In re Jenny Craig, Inc.*, 1994 FTC LEXIS 68, *1 (May 16, 1994) (acknowledging that respondents produced tens of thousands of documents constituting creative files, including drafts); *In re Rentacolor, Inc.*, 103 F.T.C. 400, 1984 FTC LEXIS 66, *16, 38 (Apr. 16, 1984) (indicating that draft advertisements had been admitted into evidence at hearing). Here, Respondents have produced only a tiny smattering of drafts for their final promotional materials. Respondents should be ordered to find and produce all draft promotional materials.

During the pre-*Complaint* investigation, the staff strongly emphasized that Respondents must retain drafts of promotional materials. *See supra* page 2-3. Respondents' production very strongly suggests that they have not retained such drafts or that their search has largely failed to retrieve them. Respondents have produced only *sixty-three* pages of draft advertisements—a

sum utterly dwarfed by the production, to date, of 1,239 pages of final advertisements.⁹ This disparity is deeply disturbing, especially as *no* draft ads for Leptoprin have been produced at all—and Leptoprin was the highest-selling product challenged in the *Complaint*. Moreover, most of the draft pages produced by Respondents appear to be nearly final versions of the final ads, with little or no variations in text. Respondents have produced only *sixteen* pages of draft ads that do not appear to be nearly final versions of the ads that were disseminated.¹⁰

Respondents' final ads did not simply spring into life, fully-formed, like the mythical Athena from the head of Zeus. Before dissemination, these ads necessarily went through a process of creation and, presumably, editorial and legal review. Yet Respondents have produced very few draft ads.¹¹ The Court should order Respondents to locate and produce all draft ads.

⁹ Respondents' 63 pages of draft advertisements are marked with Bates numbers R44459-R44521. These pages were produced at the end of *October*, in response to our *June* request. The total number of final advertising pages, 1,239, represents final print ads for Anorex (107 pages, R224-R320 and R6549-R6558), Cutting Gel (342 pages, R6719-R6932, R8943-R8965, R6587-R6691), Dermalin (282 pages, R9192-R9363, R12259-R12309, R8966-R9024), Leptoprin (163 pages, R12310-R12358, R29672-R29785), Pedialan (162 pages, R29786-R29896, R35521-R35571), and Tummy Flattening Gel (183 pages, R35572-R35704, R32749-R32790, R35705-R35712).

¹⁰ Of the 63 pages produced by Respondents to date, 47 pages are "imaged" documents that appear to be nearly final versions of the final ads. *See* Ex. J (providing examples of imaged documents). Notably, these so-called "drafts" contain actual toll-free numbers, indicating that they were ready, or nearly ready, for dissemination in print publications.

Even taking into account that print advertisements appeared numerous times in varying publications, and were produced multiple times, more than 16 pages of non-final drafts should exist simply because Respondents have produced more than sixteen different final print ads in total for the challenged products. Presumably, each ad went through at least one, if not multiple, drafts. Our review of the overall document production, and the overwhelming volume of final advertisements compared to draft advertisements, both strongly indicate that Respondents have not located and produced all draft advertisements.

¹¹ Respondents have retained and produced some draft packaging. Our *Motion* and *Memorandum* do not seek production of additional packaging because there was a limited variety

The paucity of draft ads produced to Complaint Counsel raises disquieting questions concerning the scope of Respondents' search for documents, and/or their compliance with our document retention instructions. At present, Respondents have performed an unexplained, apparently arbitrary, and largely unproductive search for responsive documents. Respondents' continuing failure to produce these documents very seriously prejudices Complaint Counsel by preventing the discovery of relevant evidence and potentially foreclosing highly relevant lines of inquiry in upcoming depositions of Respondents' advertising employees, consultants, and/or independent contractors. Under these serious circumstances, an *Order* should issue, compelling Respondents to perform a complete search and to produce all responsive drafts. *See, e.g., In re Natural Organics, Inc.*, 2001 FTC LEXIS 31, *3 (requiring respondents to produce "any non-privileged non-disseminated advertisements . . . and any actual or proposed modifications to any disseminated or non-disseminated advertisements").

ii. Radio Promotional Materials

Respondents marketed the challenged products to consumers via radio. On October 28, 2004, Respondents belatedly produced, in response to our June 25th *Document Request*, copies of one two-minute radio ad and one thirty-minute radio ad for the Leptoprin product challenged in the *Complaint*. Respondents have advised Complaint Counsel that they have provided us with all "available" final radio spots for the challenged products. However, Complaint Counsel have recently determined, from Respondents' own document production, that other radio ads exist and

of product packages for the challenged products, and we believe that Respondents have produced drafts of most of those packages. However, there were many different print and other ads for the challenged products, and few draft versions appear to have been produced. Complaint Counsel are prepared to submit Respondents' limited production for *in camera* review if the Court believes that such review would be helpful or otherwise appropriate.

should be available.¹² A proper search for evidence should have revealed these promotional materials. Respondents failed to affirmatively disclose these materials, thereby imposing upon Complaint Counsel the requirement of not only asking for certain evidence, but *confirming* that the evidence actually exists, and then identifying it with specificity. This hardly comports with the RULES OF PRACTICE. Respondents' incomplete search is unjustified. Respondents have not produced all radio promotional materials, despite our requests. This Court should compel Respondents' compliance with our initial discovery requests.

iii. Internet Promotional Materials

Respondents marketed the challenged products to consumers via Internet websites, email, and/or streaming online content. Examples of Respondents' Internet websites were attached as Exhibits to the Commission's *Complaint*. See Compl. Exs. B, E, G, I, J, L. Several documents produced by Respondents refer to promotional emails and streaming online content produced for Respondents by a third party advertising agency or agencies.¹³ However, Respondents did not produce those emails and streaming online promotional materials, and they have not produced other forms of Internet promotional materials.

Most disturbingly, Respondents failed to disclose to Complaint Counsel in their *Initial Disclosures* that the ad agencies producing these Internet promotional materials even *existed*, and might have relevant documents. See Resp'ts' Initial Discl. (Aug. 10, 2004) (attached hereto as

¹² See Ex. K (email, stamped R42202, from Gary Sandberg, Basic Research, to ad agency employee Scott Ferguson, discussing four 60-second radio ads and a 30-second radio ad produced for Leptoprin). None of these radio ads were produced in discovery.

¹³ See Ex. L (emails, stamped R42560 and R41903, referring to promotional emails created for Leptoprin and online streaming for the Leptoprin email campaign).

Ex. M) (containing no identification whatsoever of advertising agencies and other firms that helped develop advertisements for the challenged products). Respondents even took steps to *conceal* the identity of an ad agency by “blacking out” its contact information. *See* Ex. H at 1 (email stamped R34151). Our discovery of these entities was largely fortuitous.

Complaint Counsel attempted to obtain the missing promotional materials through subpoenas served on two ad agencies and one commercial producer that we later identified, but unfortunately, the subpoena responses did not appear to include final email ads and streaming online promotional materials. The subpoena responses did, however, refer to still *more* Internet promotional materials not disclosed in discovery.¹⁴ These promotional materials have not been produced, and an *Order* compelling their production should issue.

¹⁴ *See* Ex. N at 1 (email, stamped F790, referring to Anorex Web advertisements, which final electronic advertisements were also not produced in discovery).

Complaint Counsel believe that Respondents have used a corporate shell game to avoid producing documents. For example, in the above-cited email, Gary Sandberg of Basic Research used an email address, “mjstc.net,” registered to Basic Research’s affiliate, Western Holdings. *See id.* at 2-3 (registration of “mjstc.net” to Western Holdings, with “basicresearch.org” email address). Other email confirms that Gary Sandberg used this “mjstc.net” email address for Basic Research. *See id.* at 4 (email, stamped SDT950-51). Yet, when we subpoenaed Western Holdings directly, the firm said that it had no responsive documents. *See id.* at 6 (Letter stamped SDT001). And when we subpoenaed Respondent Gay’s firm, Majestic Enterprises, which also may have used the name “mjstc.net,” we obtained a similar response. This response was apparently prepared by a paralegal to Respondent’s counsel. *See id.* at 7 (Letter stamped SDT003, bearing computer mark “NSlatter”); *id.* at 8 (identifying Nichole Slatter as paralegal employed by Respondent’s counsel). Subpoenas to other third parties closely related to Respondents through ownership, management, or employment resulted in similar responses that no responsive documents existed.

As the Court will recall, Respondent Basic Research moved to quash our subpoenas to these eight non-parties affiliated with Basic Research. The Court largely denied this motion. *See* Order, Aug. 18, 2004, at 2-3 (modifying subpoena and ordering recipients to comply). Strangely, the third parties produced no additional documents other than letters like those referenced above. Based on these and other episodes, we believe that Respondents and their affiliates have used a corporate shell game to avoid producing documents in response to our discovery requests.

Additionally, promotional materials appearing on Internet website-based message boards have not been produced. Respondents promote several of the challenged products on Internet websites featuring message boards such as leptoprinsupport.com, weightlossforchildren.com, and kleinbeckersupport.com. See Ex. O (providing excerpts from websites as they currently appear). Respondents' past and present representations on these commercial websites, including those appearing on message boards for the challenged products, are relevant to whether Respondents actually made the representations alleged in the *Complaint*. Respondents have failed to produce any material or text that appeared on their public Internet message boards. While Complaint Counsel have found some of these promotional materials on the Internet, related Internet materials are not available to us, including messages and material that Respondents presented on their Internet websites and message boards and then elected to delete before we became aware of them. As previously noted, Complaint Counsel instructed Respondents to retain all of their marketing materials. See *supra* page 2-3. Respondents presumably retained Internet materials including materials posted on their promotional websites, so these materials should be available to them. Respondents have not produced all responsive evidence. This Court should issue an *Order* instructing Respondents to conduct a complete search and to produce the draft and final promotional materials discussed herein.

2. Respondents Have Not Produced All Documents Referring or Relating to Final and Draft Promotional Materials for the Challenged Products [Specification 3]

Specification 3 of our *First Request for Production* seeks "all documents and communications referring or relating to draft or final promotional materials for the challenged

products.” First Req. for Prod. at 6.¹⁵ Respondents pledged to produce responsive documents.

See, e.g., Resp’ts’ Resp. at 4:

Respondents object to the extent that this Specification is overly broad, unduly burdensome, or otherwise inconsistent with Respondents’ obligations under the Rules of Practice. Subject to and without waiving these objections or the General Objections stated above, Respondents will produce responsive documents that are located after a reasonable search (see general objection (B)).

As previously discussed, Respondents have refused to explain the scope of their search, or how it was “reasonable.” However, we have been left with the *results* of that arbitrary and undefined search, and the results speak volumes. Respondents produced very few internal communications, practically no memoranda, and few if any other documents relating to draft promotional materials for the challenged products (other than a stream of emails relating to aminophylline gel ads disseminated in Mexico). Respondents have failed to produce a large amount of email correspondence and other internal documents responsive to Specification 3.

Respondents performed a *selective* search for responsive documents. This conclusion finds ample support in the sample of email correspondence produced to Complaint Counsel. Respondents generally chose to produce a sample of email generated in a limited time period, from August 4, 2003, through July 1, 2004. *See* Ex. E (Letter to Respondents’ Counsel at 4 (noting limited time period of email production)); Ex. G (Letter from Respondents’ Counsel at 2 (stating that all “available documents” were produced)). Respondents appear to have produced emails from before this limited time period only for PediaLean, and these documents were part of

¹⁵ As noted in our *Request*, Specification 3 “includes but is not limited to contracts, documents, and communications evidencing the creation, modification, approval, execution, evaluation, dissemination, clearance, or placement of promotional materials, and documents referring or relating to the contents of draft or final promotional materials, including but not limited to any claims, messages, or communication in any draft or final promotional material(s).”

thousands of pages of previously-disclosed documents that were needlessly resubmitted. Our document request was *not* limited to this very narrow time period, or this one product, and for good reason—all of the challenged products were marketed before August 2003, in some instances, several years before that date. Indeed, Respondents first submitted purported substantiation in support of Dermalin, Cutting Gel, and their ephedra-based products in 2001.

We have been able to verify, through review of Respondents' previous CID submission and subpoenas duces tecum responses from third parties, that Respondents used email before August 4, 2003, in the course of developing and promoting the challenged products. Examples of these emails, including emails sent directly to minors interested in the PediaLean product challenged in the *Complaint*, are attached hereto as Exhibit P. In April 2002, the FTC staff instructed Basic Research to retain email and interoffice messages.¹⁶ There is no legitimate reason why this relevant, material evidence should not have been retained and produced in response to Specification 3.

Notably, Respondents' sample of internal email was largely devoid of emails from Respondents Gay and Friedlander. Complaint Counsel have reason to believe that these persons have directed or participated in the marketing of the challenged products. The *Complaint* makes these allegations, and Respondents have chosen to deny them, so the questions are clearly at issue. See Compl. at ¶¶ 7 & 9; Answer, Resp't Gay at 2; Answer, Resp't Friedlander at 2. We have obtained evidence confirming that Messrs. Gay and Friedlander did, indeed, employ email

¹⁶ See Ex. A (Letter to Respondents' Counsel at 1 (instructing Respondents to retain, *inter alia*, interoffice messages, all documents in Marketing Department, and "all documents" in Business Development category, which, according to Respondents' previous letter, also attached as Ex. A, included electronic mail)).

to communicate in the course of marketing and selling the challenged products. *See* Ex. P at 7-13 (emails and documents, stamped 5004617, 5003610, SDT1314, SDT1426, SDT1429, 5037741) (providing examples). Respondents failed to produce some of these emails in discovery, but we were able to obtain some emails from third parties who retained them, as Respondents should have done. All of Messrs. Gay and Friedlander's responsive emails, interoffice messages, and other responsive communications should be produced.¹⁷

Specification 3 is not overbroad, unduly burdensome, or inconsistent with the RULES. It seeks clearly relevant information, in the form of documents and communications concerning "promotional materials for the challenged products." *See* 1st Req. for Prod. at 6. These requested materials may provide compelling and direct evidence of Respondents' respective roles in the creation and dissemination of the advertisements and practices challenged in the *Complaint*. Respondents claim that this Specification imposes an undue burden upon them. *See* Resp'ts' Resp. at 4. As Respondents have already delimited the scope of their own search, their statement that Specification 3 is "unduly burdensome" essentially admits that relevant documents may be found in places that Respondents find inconvenient, or would prefer not to search. This response might suffice for a discovery request only peripherally related to this matter, but it is

¹⁷ Additionally, based on the small sample of emails produced, Respondent Gay appears to have employed the "task" feature of Microsoft Outlook to communicate with employees. *See* Ex. P at 19. All such responsive communications should be produced.

The examples highlighted in the present *Memorandum* are for illustrative purposes. Due to Respondents' ill-defined search and selective production of documents, we cannot ascertain whether there are additional categories of documents responsive to Specification 3 that have not been produced. Respondents' *Privilege Log* likewise gives us no ability to discern what types of documents have been intentionally withheld from production on grounds of privilege. *See* Compl. Counsel's Opp'n to Resp't's Mot. to Compel Prod. of Priv. Log (Nov. 26, 2004). The RULES do not contemplate putting Complaint Counsel in this position of having to repeatedly point Respondents to their own documents in order to obtain those documents through discovery.

unreasonable for Respondents to refuse to search for all documents responsive to this crucial discovery request.

The RULES provide that discovery may be limited when it is “obtainable from some other source that is more convenient, less burdensome, or less expensive; [t]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or [t]he burden and expense of the proposed discovery outweigh its likely benefit.” RULE 3.31(c)(1)(i-iii). None of these factors apply here. Following the staff’s instructions, Respondents should have retained these documents and communications. Respondents have admitted having their principal office or place of business at the same address. *See Answer, Resp’t Basic Research at 1-2.* This allows for a more convenient and efficient search. The burden on Respondents in providing this relevant information is not undue or unreasonable. *See In re Natural Organics, Inc.*, 2001 FTC LEXIS 31, (attached hereto as Ex. I); *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 272, *2 (June 12, 1991); *see also In re Exxon Corp.*, 1978 FTC LEXIS 183, *15-16 (Sept. 8, 1978) (“The defendant may not excuse itself from compliance with discovery by utilizing a system of recordkeeping which . . . makes it unduly difficult to identify or locate [relevant records].”). Complaint Counsel did not have previous opportunities by discovery in this action to obtain these materials from Respondents, and we have not succeeded in obtaining all of this material from third parties. We have sufficient evidence to show that Respondents have not made a complete search. Documents and communications evidencing the creation and dissemination of promotional materials, and documents referring or relating to the contents of draft or final promotional materials are clearly relevant to this matter. An *Order* compelling a complete search and production of materials responsive to Specification 3 should issue.

3. Respondents Have Not Produced All Documents Referring or Relating to the Marketing of the Challenged Products [Specification 6]

Specification 6 of our *First Request for Production* seeks “all documents and communications referring or relating to the marketing of each of the challenged products.” *See* 1st Req. for Prod. at 6.¹⁸ Respondents pledged to produce documents responsive to Specification 6, again raising the same objections of overbreadth, undue burden, and inconsistency with the RULES OF PRACTICE, and agreeing to perform a “limited” search. *See* Resp’ts’ Resp. at 6.

Respondents’ document production appears to contain few, if any, materials relating to marketing of the challenged products as defined and called for in Specification 6. Complaint Counsel have been largely unable to locate such market research in the document production.¹⁹ On September 22, 2004, we brought this problem to the attention of Respondents’ counsel, and requested: “If you state that you have produced documents responsive to this Specification, please identify the responsive documents by Bates number.” Respondents did not identify responsive documents, confirming our impression that such materials were fully produced. For their part, Respondents have admitted that “no additional market research, marketing plans, . . .

¹⁸ As noted in the *Document Requests*, this request “includes but is not limited to market research, marketing plans or strategies, and all other document(s) and communications referring or relating to copy tests, marketing or consumer surveys and reports, penetration tests, target audiences, recall tests, audience reaction tests, communications tests, consumer perception of any promotional materials for any of the challenged products.”

¹⁹ In September, Complaint Counsel pointed Respondents to two market forecasts referenced in emails. *See* Ex. E at 5. Respondents agreed to produce those documents, and did so in mid-November. Absent an *Order* compelling Respondents to conduct a complete search and to produce all responsive documents and information, Complaint Counsel will be left in the untenable position of repeatedly following this time-consuming procedure—having to identify particular documents mentioned in other documents, and requesting their production.

or consumer perception studies have been located for the challenged products.” See Letter to Complaint Counsel at 3 (attached hereto as Ex. G). However, based on evidence obtained by Complaint Counsel, we believe that Respondents’ failure to locate such documents is attributable not to a lack of evidence, but to the self-professed “limited” scope of Respondents’ search.

Complaint Counsel have reason to believe that Respondents prepared or reviewed documents containing market surveys or reports in connection with the marketing of the challenged products. Aside from two market forecasts specifically identified by Complaint Counsel and belatedly produced by Respondents, other documents reveal that “marketing plans” have been devised for Respondents’ products. See Ex. Q (printout from flyingpointmedia.com referring to “marketing plans”).²⁰ These marketing plans have not been located and disclosed. Specification 6 explicitly calls for “marketing plans.” There is no legitimate reason why a complete search for marketing materials should not take place. Such evidence should be located and produced by Respondents, especially since they were instructed to retain Marketing Department materials. These documents may well reveal the message that Respondents intended to convey in the actual disseminated advertisements, and shed further light on their advertising practices. See *In re Natural Organics, Inc.*, 2001 FTC LEXIS 31 (attached hereto as Ex. I).

Additionally, we are aware that, well in advance of this litigation, Respondents engaged in copy testing relating to the marketing of the challenged products. Specification 6 includes “document(s) and communications referring or relating to copy tests,” and those underlying

²⁰ Even if there was no extrinsic evidence pointing out unlocated and undisclosed documents, the Court could reasonably infer that Respondents possessed written marketing plans, surveys, test, or other market research from their level of market activity. Respondents have achieved more than \$60 million in total gross sales of the challenged products. See Ex. R.

documents have not been produced. In pre-*Complaint* discussions with Complaint Counsel, Respondents provided us a written report summarizing the copy test and disclosing some of its results. The report acknowledged that consumers were exposed to Dermalin-APg print ads, and were asked, “[a]ccording to that advertisement, what are the results someone might expect if they use Dermalin?” See Dermalin-APg Information Communication Study at 3(excepts attached hereto as Ex. S). Significantly, the report did *not* disclose how consumers answered this question, which is indisputably relevant to advertising interpretation issues relating to Dermalin. The questionnaire responses and data relating to copy testing of consumer perception of claims made for the challenged products is relevant to this action, and Complaint Counsel has been unable, to date, to obtain this early test data from others.²¹

²¹ Complaint Counsel believes that this evidence may be in the possession of Mr. Popper, the author of the 2002 study, as well as Respondents. However, Mr. Popper has not produced the data, or any other materials, in response to a timely subpoena. Respondents designated Mr. Popper as an testifying expert witness on October 13, 2004. On November 29th, the general deadline for submission of Respondents’ *Expert Reports*, Respondents advised us that they were withdrawing their designation of Mr. Popper as a testifying expert witness. This evidence was clearly discoverable before that time, and Respondents’ late tactical decision does not modify this conclusion. The Commission’s non-testifying expert rule applies to experts who were “retained or specially employed by another party in anticipation of litigation or preparation for hearing.” RULE 3.31(c)(4)(B)(ii). The 2002 copy test results were not obtained in anticipation and preparation of this litigation. Rather, the results were obtained well before this litigation commenced, and were disclosed in the hopes of obviating the need for litigation.

Moreover, Respondents’ decision to redesignate Mr. Popper as a non-testifying expert does *not* alter the fact that Respondents chose to disclose certain documents to him, potentially including privileged documents, while he was still designated as a testifying expert. Disclosure of documents shown to a testifying expert, even once that expert has been re-designated as a non-testifying expert, is required. See *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176 (D. Del. 2003) (holding that defendant was required to produce privileged documents that it provided to expert witness, notwithstanding that defendant decided to change designation of witness from testifying to non-testifying expert, as defendant could not undo its waiver of the privilege which occurred when it first provided the documents); *FMC Corp. v. Vendo Co.*, 196 F. Supp.2d 1023, 1044 (E.D. Cal. 2002) (“designation of an expert as expected to be called at trial, pursuant to Fed. R. Civ. P. 26(b)(4)(A), even if that designation is subsequently withdrawn, takes the

Respondents' objections of overbreadth are unjustified. The *Document Request* very clearly identifies the documents subsumed in Specification 6. *See supra* n.17. In a Section 5 and 12 case, a single *Document Request* focusing on how Respondents planned to market the challenged products hardly imposes an undue burden. Contrary to Respondent's contention, Specification 6 is entirely consistent with the RULES OF PRACTICE. It is a highly relevant discovery request—and one that Respondents have failed to fully honor. An *Order* compelling the production of the marketing materials called for in Specification 6 should issue.

4. Respondents Have Not Produced Communications Referring or Relating to Product Endorsers and Testimonialists [Specification 7]

Respondents have not fully complied with Specification 7, which seeks “all documents and communications referring or relating to persons who are depicted, named, or quoted in promotional materials for each of the challenged products.” *See* 1st Req. for Prod. at 6. As we noted in our *Document Request*, this Specification “includes but is not limited to documents and communications referencing endorsers and testimonialists.” *Id.*

Respondents pledged to produce documents responsive to Specification 7, again raising objections of overbreadth, undue burden, and inconsistency with the RULES, and agreeing to perform a “limited” search. *See* Resp'ts' Resp. at 6. However, Respondents did *not* produce all documents and communications referring or relating to all of the endorsers depicted, named, or quoted in promotional materials. Notably absent from Respondents' production were emails and

opposing party's demand to depose and use the expert at trial out of the ‘exceptional circumstances’ category”); *House v. Combined Ins. Co.*, 168 F.R.D. 236, 245 (N.D. Iowa 1996) (same). Absent disclosure of the withheld copy test questionnaires and data, Respondents will likely seek to use the non-testifying expert rule both as sword and shield, using some results of the copy test to their own advantage, and hiding the rest.

other communications with consumer endorsers depicted in advertisements for Leptoprin, including spokesperson and endorser Tony Trupiano. *See* Compl. Ex. H-1 at 5 (transcript of Trupiano endorsement). Respondents presumably retained such documents in compliance with our pre-*Complaint* instructions. Respondents are responsible for the representations made by consumer endorsers in promotional materials for the challenged products. Respondents' failure to produce documents concerning these consumer testimonialists, who appeared in widely-televised commercials, is unjustified. Specification 7 is not overly broad, it seeks documents and communications that Respondents were required to retain in the course of our investigation, and these materials are not readily available from other sources—indeed, Respondents did not even provide us with contact information for the consumer testimonialists themselves, which we were unable to obtain from third parties until very late in discovery. Respondents have contended that all responsive documents are available. The missing communications are responsive and have not been produced. Under these circumstances, an *Order* compelling the production of materials responsive to Specification 7 should issue.

**5. Respondents Have Not Produced Documents
Relating to their Corporate Organization
[Specification 11]**

Respondents have not complied with Specification 11, which sought “all documents relating to the corporate structure of each company for which any individual Respondent is an officer, director or significant shareholder.” 1st Req. for Prod. at 6. As noted in the *Document Request*, this request included, among other things, articles of incorporation, documents showing the form of organization for each Corporate Respondent and all subsidiaries and affiliates, organizational charts, and documents describing the duties, responsibilities and authority of all

Respondents' officers, managers, directors, and supervisors. *See id.*

In response to this request Respondents again raised the same litany of objections—overbreadth, undue burden, and inconsistency with the RULES OF PRACTICE. *See* Resp'ts' Resp. at 8.²² They also specifically objected “to the extent that [Specification 11] requests documents relating to companies that are not Respondents.” Resp'ts' Resp. at 8. Respondents did pledge to produce a narrower category of materials—company formation documents, by-laws, and annual reports and filings limited to documents that pertain to the company structure of Corporate Respondents, but not their affiliates, that were created on or after January 1, 2000. *Id.* However, we did not agree to limit our *Document Request* to these documents.

Respondents promised to produce these documents if such documents were located during their “limited” search. Ultimately, no responsive documents were produced.²³ Indeed, Respondents failed to produce even the narrow categories of documents described in their written *Response* to our *Document Request*. Respondents' failure to produce even these documents is another testament to the overly narrow scope of their “limited” search.

Respondents should be ordered to comply with Specification 11 in its entirety. Their objections are unfounded. Our document request was carefully crafted to seek only materials

²² Additionally, Respondents objected that Specification 11 was vague because “the relationship between the term ‘individual Respondents’ in the Specification and ‘Individual Respondents’ . . . in Definition (10) [was] not clear,” and Spec. 11 “inconsistently uses the terms ‘corporate,’ ‘company,’ ‘incorporation,’ and ‘Company.’” *Id.* In subsequently written and verbal exchanges, Complaint Counsel clarified that the term “Individual Respondents” was uniformly intended to apply to Respondents Gay, Friedlander, and Mowrey, and the other terms were intended to refer to any company or corporate entity. *See, e.g.,* Ex. G at 3.

²³ *See, e.g.,* Letter to Respondents' Counsel, Ex. E at 6 (asking Respondents to identify all documents produced responsive to Specification 11). Respondents did not identify documents in response to this letter.

“relating to the corporate structure” of firms related to Messrs. Gay, Friedlander, and Mowrey—a narrow category of documents pertaining to a clearly identifiable set of companies in which one or more of these three Respondents were officers, directors, or significant shareholders. The *Document Request* very clearly identifies the documents subsumed in Specification 11. *See supra* page 21. Respondents have access to these documents and Complaint Counsel know of no other entity that can so conveniently access all of them. Our *Request* is not overbroad, it imposes no undue burden, and it is entirely consistent with the RULES.

This Specification was calculated to lead to the discovery of admissible evidence by identifying entities closely related to Messrs. Gay, Friedlander, and Mowrey that may possess relevant evidence. Respondents have effectively frustrated this goal by drawing the discovery process out over five months—assuring Complaint Counsel that it would produce documents, and then failing to produce those documents. Specification 11 also unquestionably relates to the business activities of Respondents Gay, Friedlander, and Mowrey, specifically the transferability of their allegedly deceptive conduct to other, as yet-undisclosed entities in the event that they are not bound by a final *Order* in their personal capacities, and the common enterprise allegation of the *Complaint*. Additionally, the information requested in Specification 11 would enable us to understand the structure of the Corporate Respondents directed or owned, at least in part, by the other Respondents, and identify persons for depositions. *See generally* Compl. Counsel’s Opp’n to Mot. to Quash Subpoenas on Non-Parties (July 29, 2004).

Respondents’ refusal to provide documents and information relating to their corporate affiliates in response to Specification 11 has had the intended effect of advancing Respondents’ corporate shell game. It has impeded our investigation by forestalling the discovery of other

entities that may have responsive documents within their possession, custody, or control. An *Order* compelling Respondents' complete response to Specification 11 is appropriate in these circumstances. Five months have passed since the service of Specification 11. It is time for Respondents to comply with our first *Document Request*.

**II. Respondents Have Unjustifiably Failed to Fully Answer
Complaint Counsel's *First Set of Interrogatories***

Complaint Counsel's *Interrogatories* are narrowly drafted to seek information highly relevant to the allegations in the *Complaint* and the proposed Order. By their objections and responses to Complaint Counsel's *First Set of Interrogatories*, Respondents have avoided providing information that likely will yield relevant facts not available from other sources. Our *Interrogatories* seek information about Respondents' income and expenditures on the promotion of the challenged products, the work that they and their employees performed in creating and promoting those products, and the steps they have taken to alter their practices this year in light of the recent FDA ban on sales of ephedra. These *Interrogatories* relate to key advertising, substantiation, and liability issues in this case. An *Order* directing Respondents to fully answer these *Interrogatories* should issue.

**A. Respondents Have Failed to Answer Interrogatories Concerning
Payments and Expenditures Tied to the Allegedly Deceptive Acts**

**1. Respondents Have Failed to Disclose Payments Received in
Connection with the Deceptive Acts Alleged in the *Complaint*
[Interrogatory 6]**

Respondents have not answered Interrogatory 6, which originally read as follows:

Disclose all payments that each Respondent has received, directly or indirectly, in connection with the advertising, marketing, promotion, and sale of each of the challenged products for each year from 2001 to present. (This request includes

the total dollar amount and source of all payments. For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers.)

1st Set of Interrogs. at 6. In their *Response* to our *Interrogatories*, Respondents made a multitude of objections. They asserted that Interrogatory 6 is vague, ambiguous, overly broad, and unduly burdensome, seeks irrelevant information, seeks information protected from disclosure by the attorney-client privilege, seeks information protected by the work product doctrine, and seeks information protected by the right of privacy. *See* Resp'ts' Resp. to 1st Set of Interrogs. at 6-7 (attached hereto as Ex. T). Respondents refused to answer any portion of this Interrogatory.

After discussions between the parties, Complaint Counsel agreed to revise Interrogatory 6 as follows:

Identify Respondents that have received any payment, compensation, or income in connection with the marketing, promotion, or sale of each of the challenged products for each year from 2001 to the present, disclosing the total dollar amount and source for all payments. (For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers).

Letter from Complaint Counsel to Respondents' Counsel at 2 (Sept. 2, 2004) (attached hereto as Ex. U). This revision to Interrogatory 6 dispensed with the need to separately disclose all payments received. The clarified Interrogatory seeks an identification of the *total* amount of dollars received in connection with the marketing, promotion, or sale of challenged products. *See id.* For Corporate Respondents, the answer to Interrogatory 6 would presumably reflect product-related income, whether from sales or other sources. For Respondents Gay, Friedlander, and Mowrey, this Interrogatory would include salary information only if they received income in connection with the marketing, promotion, or sale of the challenged products. *See id.* Salary information may not identify income related to the challenged products with the precision that

Complaint Counsel would otherwise desire, but it provides at least some measure of payments received. If a bonus, royalty, profit share, or some other form of compensation did relate to the challenged products, that information would be responsive as well. *See id.*

Sales and profits data for the challenged products are relevant for numerous reasons. First, increased sales resulting from challenged advertisements can be used as evidence of materiality of claims made. *See In re Kraft, Inc.*, 114 F.T.C. 40 (1991). Second, such figures can be used to evaluate the benefit of a truthful claim and the ease of developing substantiation for a claim. *See In re Thompson Medical Co.*, 104 F.T.C. 648 (1984). Further, such figures can be used to demonstrate consumer demand. *See In re Nat'l Dynamics Corp.*, 82 F.T.C. 488 (1973). Responses to Interrogatory 6 will also reveal the share of payments, compensations, and/or income made to each Respondents, which is relevant both to the parties' respective roles in the alleged violations of law, and the common enterprise allegation of the *Complaint*.

Interrogatory 6, particularly as limited to by Complaint Counsel in response to Respondents' concerns, is hardly overbroad.²⁴ It imposes no undue burden on Respondents to disclose the total payments that they received in connection with the allegedly deceptive marketing, promotion, and sale of each of the challenged products. This financial information reasonably should have been retained by Respondents in the ordinary course of business, it is uniquely in their possession, and it is clearly relevant to this matter.

²⁴ Notably, Interrogatory 6 was limited to the challenged products, even though Complaint Counsel could readily seek discovery of income from other products. It is well-settled that sales of other products, and even overall sales for companies, may be relevant to fencing-in relief, among other issues. *See In re Natural Organics, Inc.*, 2001 FTC LEXIS 31 (citing *In re Stouffer Foods Corp.*, Docket No. 9250, 1993 FTC LEXIS 196, *69-70 (Aug. 6, 1993) and *In re Jay Norris Corp.*, 91 F.T.C. 751, 1978 FTC LEXIS 378, *245 (May 2, 1978)). Respondents have no valid basis for their refusal to answer this narrow Interrogatory.

As for Respondents' remaining objections to the disclosure of this information, Respondents cannot seriously maintain that the *fact* of total payments, compensation, and income received in connection with the marketing, promotion, or sale of the challenged products can be tucked behind the cloak of an attorney-client privilege, the work product doctrine, or a vaguely asserted "right to privacy." These are material facts, not documents generated in anticipation of this litigation, confidential communications between the parties and their attorneys,²⁵ or private matters entitled to a generalized "right of privacy," particularly when the information is sought for legitimate law enforcement purposes.²⁶ These objections are inconsistent with modern discovery practice, and harken back to the dark days in which litigants would hand information over to their counsel to forestall its disclosure in judicial proceedings. Respondents' refusal to answer Interrogatory 6, as modified by Complaint Counsel, is absolutely unjustified. An *Order* compelling each Respondent to fully comply with this request is warranted.

²⁵ See, e.g., *In re Grand Jury Subpoena*, 831 F.2d 225, 228 (11th Cir.1987) ("The privilege only protects communications between an attorney and his client made for the purpose of securing legal advice. . . . An attorney who acts as his client's agent for receipt or disbursement of money or property to or from third parties is not acting in a legal capacity, and records of such transactions are not privileged."); see also *In re Fischel*, 557 F.2d 209, 211 (9th Cir.1977) (noting that attorney-client privilege does not extend beyond the substance of the client's confidential communications).

²⁶ See *American Motors Corp. v. FTC*, 601 F.2d 1329, 1335 (6th Cir. 1979) ("Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.") (citation omitted); see also *Wainwright v. United States*, No. 83-2466, 1984 WL 261 (W.D. La. 1984) (dismissing as frivolous complaint alleging that requirement to provide income data to government invaded "right of privacy").

2. Respondents Have Failed to Disclose Advertising Expenditures Related to the Deceptive Acts Alleged in the *Complaint* [Interrogatory 7]

Despite our repeated requests, Respondents have also declined to answer Interrogatory 7, which reads as follows:

Disclose the total amount of dollars that each Respondent has spent to advertise, market, or otherwise promote each of the challenged products for each year from 2001 to the present, broken down by each medium used (*i.e.* television, print, internet, radio, or other means). This request includes, but is not limited to, all expenditures attributable to the creation, development, evaluation, approval, modification, and dissemination of promotional materials.

1st Set of Interrogs. at 6. Respondents asserted the same objections to Interrogatory 7 that they previously asserted to Interrogatory 6—vagueness, overbreadth, undue burden, relevance, the attorney-client privilege, the work product doctrine, and the right of privacy. *See* Resp'ts' Resp. to 1st Set of Interrogs. at 7. However, as previously discussed with respect to Interrogatory 6, none of these concerns are implicated here. Respondents are again withholding highly relevant, clearly identified financial data. Data on total ad expenditures, like the payment data responsive to Interrogatory 6, reasonably should have been retained by Respondents in the ordinary course of business. The total amount of ad expenditures is information uniquely in their hands.

Data on advertising and marketing costs are clearly relevant to this matter, and are not protected from disclosure. Advertising or marketing costs are clearly discoverable. *See, e.g., In re R.J. Reynolds Tobacco Co.*, 1998 FTC LEXIS 174 (Feb. 25, 1998) (granting motion to compel answer to interrogatory asking for advertising expenditures); *Natural Organics Inc.*, No. 9294, 2001 FTC LEXIS 31, at *8-9 (Mar. 15, 2001). Such data can be used to determine whether a violation is serious and deliberate. *See In re Stouffer Foods Corp.*, 1993 FTC LEXIS 196, at

*69-70. Additionally, advertising costs can be used as evidence of the size and duration of the advertising campaign relevant to Respondents' efforts to persuade consumers. *See Thompson Medical Co.*, 104 F.T.C. 6 at *413-14. And, as this Court stated in ruling on Respondent Basic Research's *Motion to Quash Third Party Subpoenas*, financial information relating to the challenged products "may lead to the discovery of information about the relationships of the parties which may be relevant to determining liability or drafting an appropriate remedy." Order, Aug. 18, 2004, at 3. Interrogatory 7, which seeks information relating to total advertising expenditures, is entirely proper and relevant to the allegations of the *Complaint*, as well as the proposed relief. Each Respondent should be ordered to answer this request for information.

B. Respondents Have Failed to Fully Answer Interrogatories Concerning the Work Performed on Promotional Materials and Challenged Products

1. Respondents Have Failed to Disclose "Who Did What Work" Regarding Promotional Materials for the Challenged Products [Interrogatory 1]

Respondents have declined to fully answer Interrogatory 1, which reads as follows:

Identify and describe in detail the current and former duties, responsibilities, or work performed by each person relating to the promotional materials for each of the challenged products.

1st Set of Interrogs. at 5. For purposes of clarification with respect to the "duties," "work," or "responsibilities" encompassed in this Interrogatory, our discovery request contained the following instruction: "This request includes, but is not limited to, the creation, development, evaluation, approval, modification, and dissemination of promotional materials." *Id.*

Respondents objected that our request was vague, overbroad, unduly burdensome, irrelevant, and intrusive on the attorney-client privilege and the work product privilege, as well

as their right of privacy. *See* Resp'ts' Resp. to 1st Set of Interrogs. at 3-5. Despite the alleged vagueness of Interrogatory 1, Respondents correctly "interpret[ed] this interrogatory as requesting the identity of persons and descriptions of duties, responsibilities and work performed." *Id.* at 3. They then provided a partial answer to Interrogatory 1 as follows:

1. Dan Mowrey, Ph.D, researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation;
2. Mitch Friedlander, determined commercial viability of products, wrote copy, directed ad layout, and assisted with marketing;
3. Gina Gay, placed advertisements with media;
4. Jeff Davis, proof read advertisements;
5. Brett Madsen, assisted with copy layout;
6. Ned Simpson, assisted with copy layout;
7. John Swallow, reviewed ad copy;
8. Nathalie Chevreau, Ph.D., PediaLean project director; assisted with website development for PediaLean; performed PediaLean safety tests;
9. Carla Fobbs, facilitated and obtained substantiation review from outside counsel;
10. Dennis Gay, final approval of products and advertisements; and
11. Stephen Nagin, Esq., performed substantiation review.

Id. at 4. This answer generally failed to specify the promotional materials and the challenged products for which each person listed performed "duties, responsibilities, or work." *See* Resp'ts' Resp. to 1st Set of Interrogs. at 4. Interrogatory 1 specifically requests information with regard to the promotional materials for each of the challenged products. *See* 1st Set of Interrogs. at 5.

Other than the response relating to Ms. Chevreau, which identified the PediaLean website as the relevant promotional material, and PediaLean as the relevant product, Respondents' answer did *not* specify the promotional materials and the challenged products for which each person listed performed work. *See* Resp'ts' Resp. to 1st Set of Interrogs. at 4.

Respondents should be ordered to remedy these obvious omissions. Respondents'

objections that our request was vague, overbroad, and unduly burdensome are unworthy of credence. As their response relating to Ms. Chevreau indicates, Respondents certainly can identify the products and ads on which each person performed work without any undue burden. Moreover, on October 8, 2004, Respondents' counsel agreed to provide "a supplemental answer that identifies individuals who have done particular promotional work in relation to the challenged products," and asked for more information on the particular promotional materials that we sought information about. *See* Ex. G at 5 (Letter to Complaint Counsel (Oct. 8, 2004)). Complaint Counsel repeatedly identified the ads covered by this Interrogatory at Respondents' request. *See* Ex. V (Letter to Respondent's Counsel (Nov. 5, 2004) and Email to Respondent's Counsel (Dec. 1, 2004)). Respondents have signaled that they are able to provide the requested information, but they have failed to do so, or to provide any reasonable excuse for their failure.

Respondents' relevance objection to Interrogatory 1 is completely without merit. Our request for an identification of the specific product and promotional materials worked on by persons who did work on the promotional materials is palpably calculated to lead to the discovery of relevant testimony and evidence. As for Respondents' remaining objections, Respondents cannot reasonably maintain that disclosure of the *facts* here actually imperil a valid attorney-client privilege with respect to anyone other than, possibly, Mr. Nagin. The other attorney identified by Respondents has publicly disavowed Respondents' representation that he "reviewed ad copy" for the challenged products. *See* Robert Gehrke, *2d Congressional District Candidate Says Basic Research's Legal Filing Must Be a Mistake*, *Salt Lake Tribune* at A1 (Sept. 4, 2004):

Swallow said the filing must be a mistake, because in three years as the company

general counsel he primarily handled contract and human resource matters. "If they had me reviewing the ads, they would have been nuts because I don't know a thing about that FTC staff," he said. "I'm not even sure what ads they're talking about. That wasn't my role at all."

(attached hereto as Ex. W). Respondents even admitted themselves, to the *Salt Lake Tribune*, that their answer to Interrogatory 1 was erroneous:

Dave Owen, a spokesman for Basic Research, said the company reviewed its records after the FTC filing and they do *not* reflect Swallow working on ad preparation. When Swallow worked for the company, it was a \$6 million business and work was farmed out to a handful of law firms. This year, its business will approach \$300 million and employ some 20 law firms.

"It would have been completely outside his job description to do that," Owen said. "He doesn't have any background in that. You just wouldn't have him do that."

Id. (emphasis added). Respondents did not share this fact with Complaint Counsel. Nor did they file a corrected response to Interrogatory 1. Our discovery of these facts was, again, fortuitous, stemming from our independent review of the LEXIS-NEXIS database.

Respondents are not entitled to the shelter of the work product doctrine, or a vaguely asserted "right to privacy," with respect to Interrogatory 1. Merely identifying persons involved (or *purportedly* involved, in the strange case of Mr. Swallow) does not answer the question. Respondents should be ordered to remedy their omissions and supply the material facts.

**2. Respondents Have Failed to Disclose "Who Did What Work"
Regarding the Production of the Challenged Products
[Interrogatory 2]**

Respondents largely declined to answer a related query, Interrogatory 2. This Interrogatory seeks information relating to the *production* of the challenged products, which is relevant to their efficacy. Interrogatory 2 reads as follows:

Identify and describe in detail the current and former duties, responsibilities, or

work performed by each person consulted by you, or upon whose advice, opinion, or expertise you relied in the production of each of the challenged products.

Id. For purposes of clarification with respect to the “duties,” “work,” or “responsibilities” contemplated by Interrogatory 2, our discovery request contained this instruction: “This request includes, but is not limited to the creation, development, evaluation, approval, and manufacture of the challenged products,” *id.*, in short, the production of those products.

With respect to Interrogatory 2, Respondents reiterated their boilerplate objections of vagueness, overbreadth, burden, relevance, privilege, and privacy, which were discussed in detail *supra* pages 27-30 and 32-34. Respondents then provided the following response:

Based on, subject to, and without waiving the foregoing responses and objections, Respondents respond by referring to their Response to Interrogatory No. 1, which includes the persons consulted.

Id. at 4. This answer is plainly insufficient. Interrogatory 2 seeks information concerning the “creation, development, evaluation, approval and manufacture of the challenged products.” 1st Set of Interrogs. at 5. Respondents’ answer, which referred to their response to the previous Interrogatory, completely ignored the fact that the previous Interrogatory relates primarily to advertising and substantiation review responsibilities, not the production of the challenged products.²⁷ Again, merely identifying persons involved does not answer the question.

The significance of this Interrogatory is that Respondents have allegedly marketed certain dietary supplements to American consumers, including the parents of overweight children and those children themselves, with unsubstantiated and false claims. One Interrogatory directed to

²⁷ Respondents later identified one person who “oversees manufacturing from Basic Research LLC,” and several outside firms that provided manufacturing services. *See* Ex. G (Letter from Respondents’ Counsel) at 4. However, this response does not fully answer the Interrogatory, which was not limited to the manufacture of the challenged products.

the production of the challenged products imposes no undue burden and is reasonably calculated to lead to admissible evidence concerning the efficacy of the products. If Respondents are allowed to rest on their current answer, then Complaint Counsel will be compelled to waste valuable time and resources belonging to both sides to retrieve the relevant facts through depositions and guesswork. Interrogatories are designed to dispense with the need for such wasteful exercises. Respondents should be ordered to remedy their omissions and supply the material facts in response to Interrogatory 2.

C. Respondents Have Failed to Fully Answer an Interrogatory on their Recent Advertising Practices for Leptoprin and Anorex [Interrogatory 9]

Respondents have declined to fully answer Interrogatory 9, which requested that they “[d]escribe in detail the actions each Respondent has taken to comply with the U.S. Food and Drug Administration’s prohibition on the sale of dietary supplements containing ephedrine alkaloids, effective April 23, 3004.” 1st Set of Interrogs. at 6. For purposes of clarification with respect to the “actions” contemplated in this Interrogatory, our request stated: “This request includes, but is not limited to, identification of any product formulations that have been created, modified, or removed from distribution, identification of any promotional materials that have been created, revised, or removed from dissemination, and the dates(s) on which all of actions described in your answer took place; and how orders for Leptoprin or Anorex or in response to existing promotional materials Leptoprin or Anorex have been fulfilled.”

Again with respect to Interrogatory 9, Respondents reiterated their boilerplate objections of vagueness, overbreadth, burden, relevance, privilege, and privacy, which were discussed in detail *supra* pages 27-30 and 32-34. Respondents offered only a partial response to this

Interrogatory, focusing on the identification of product formulations that were removed from distribution in response to the FDA ban. *See* Resp'ts' Resp. to 1st Set of Interrogs. at 8-9 (describing how materials containing sources of ephedrine alkaloids were identified and destroyed). Respondents' response pointedly failed to respond to Interrogatory 9 as pertaining to the "identification of any promotional materials that have been created, revised, or removed from dissemination." 1st Set of Interrogs. at 6. This request is clearly relevant to this matter, as it asks how Respondents have changed their *advertising practices* since April of this year, when the FDA ban took effect. Did Respondents continue to use ads for the ephedra-based versions of Anorex and Leptoprin after those products were withdrawn from the market? Complaint Counsel have reason to believe that Respondents may have continued to use those ads, which were challenged in the *Complaint*, and thereby continued to violate the Act, as alleged therein. This Interrogatory is relevant not only to Respondents' practices, but the scope of relief, as the continued use of promotional materials for the withdrawn ephedra versions of Anorex and Leptoprin points to an even more serious violation, and the need for a correspondingly stringent *Order*. Respondents should be directed to fully answer Interrogatory 9 relating to their advertising practices and use of the advertisements identified in the *Complaint*.

CONCLUSION

Complaint Counsel have attempted for many months to obtain all of the material evidence described in this *Memorandum* from Respondents. With the close of discovery approaching, and negotiations regarding our first discovery requests reaching a clear impasse at this time, we respectfully submit that Respondents' dubious discovery tactics warrant judicial intervention.

Respondents have not fully complied with our June 25th discovery requests. Instead, they

have manipulated the discovery process itself—performing an incomplete search for documents, redacting portions of emails and consumer complaints, delaying or dragging out their document production, disregarding our discovery instructions and producing thousands of pages of surplus documents, pledging to produce certain types of documents and then producing none of those documents, failing to produce ads, failing to identify knowledgeable third parties like their ad agencies, offering answers to Interrogatories that are admittedly incorrect and not correcting those errors, selectively producing emails and other documents, producing ten thousand pages of documents after the deadline for issuance of subpoenas to third parties, filing a *Motion to Quash* subpoenas to company affiliates that had no responsive documents, filing successive *Motions to Compel* in the apparent hope of fatiguing this Court with discovery disputes in advance of this *Motion*, failing to answer any further interrogatories or produce any documents in response to other discovery requests, and then retroactively declaring last week that an impasse existed two months ago all of these tactics bespeak Respondents’ willingness to manipulate the discovery process to their own ends.²⁸

For the reasons fully set forth in this *Memorandum*, Complaint Counsel respectfully request that the Court grant Complaint Counsel’s *Motion to Compel* and order Respondents to provide the requested documentary materials and answers to *Interrogatories* within five days of the date of this Court’s *Order*. Such an *Order* is well-warranted under the serious circumstances present here.

²⁸ The first eleven tactics referenced here are discussed *supra* pages 5, 9, 4, 6 n.5, 25, 12, 12-13, 34-35, 4, and 14 n.14, respectively. In light of the Court’s recent *Order* clarifying the number of discovery requests that are available in the action, Complaint Counsel are continuing our negotiations with Respondents regarding their failure to produce any information or documents in response to other *Document Requests* and sets of *Interrogatories*.

The requested *Order* will prevent further prejudice to Complaint Counsel related to Respondents' non-compliance with our very first discovery requests, in advance of the depositions scheduled to take place this month and next, which will conclude discovery in this matter.

Respectfully submitted,



Laureen Kapin (202) 326-3237

Joshua S. Millard (202) 326-2454

Robin M. Richardson (202) 326-2798

Laura Schneider (202) 326-2604

Division of Enforcement

Bureau of Consumer Protection

Federal Trade Commission

601 Pennsylvania Ave., N.W.

Washington, D.C. 20580

Dated: December 6, 2004

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC
LABORATORIES, L.L.C.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,**

Respondents.

Docket No. 9318

PUBLIC DOCUMENT

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION
OF DOCUMENTARY MATERIALS AND ANSWERS TO INTERROGATORIES**

Upon consideration of Complaint Counsel's Motion to Compel Production of Documentary Materials And Tangible Things and Answers to Interrogatories, and all related papers and arguments of the parties, it is hereby

ORDERED that Complaint Counsel's Motion To Compel is GRANTED, and it is further ORDERED that, no later than five (5) business days after entry of this Order, Respondents other than pro se Respondent Mitchell K. Friedlander shall produce all documents and make available for inspection all documentary materials and tangible things responsive to Specifications 2, 3, 6, 7, and 11 of Complaint Counsel's *First Request for Production of Documentary Materials and Tangible Things*; and it is

ORDERED that, no later than five (5) business days after entry of this Order, Respondents other than pro se Respondent Mitchell K. Friedlander shall provide complete answers to Complaint Counsel's *Interrogatories 1, 2, 6, 7, and 9*.

Stephen J. McGuire
Chief Administrative Law Judge

Dated: December __, 2004

STATEMENT PURSUANT TO RULE 3.22(f)
FOR COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTARY MATERIALS AND ANSWERS TO INTERROGATORIES

I HEREBY CERTIFY that Complaint Counsel conferred with Respondents' Counsel in an effort in good faith to resolve by agreement the issues raised in *Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories*. As set forth below, Complaint Counsel repeatedly conferred with Respondents' Counsel and made extensive efforts to obtain complete responses to *Document Requests* 2, 3, 6, 7, and 11, and *Interrogatories* 1, 2, 6, 7, and 9.

From recent exchanges with opposing counsel, Complaint Counsel anticipate that Respondents will contend that we have not seasonably moved to compel production of the material identified in our *Motion to Compel*. For this reason, we submit an extended RULE 3.22(f) Statement summarizing the extensive efforts that we have made to negotiate in good faith with Respondents in lieu of filing the present *Motion*, which now appears to be reasonably necessary.

1) Discovery Requests and Initial Response. Complaint Counsel served the *Document Requests* and *Interrogatories* that are the subject of the present *Motion to Compel* on June 25, 2004. Following the filing of Respondents' *Appearances*, Complaint Counsel agreed to several extensions of time to respond as a courtesy to their counsel. On August 9th, over six weeks after service of our discovery requests, Complaint Counsel received product samples. On August 16th, we received Respondents' Interrogatory responses. Later, on or about August 18th, we received seven boxes of documents.

2) Early Negotiations with No Declaration of Impasse. Thereafter, Complaint Counsel repeatedly conferred with Respondents' counsel and made extensive efforts to obtain complete discovery responses. Beginning on August 23, 2004, Complaint Counsel Laureen Kapin, Joshua Millard, Robin Richardson, and Laura Schneider conferred over the phone with Respondents' counsel Jeffrey Feldman, Richard Burbidge, Ronald Price, and Stephen Nagin. Complaint Counsel and Respondent's Counsel reached agreement on numerous issues relating to the *Document Requests* and *Interrogatories*. The parties agreed to continue their discussions.

When Complaint Counsel raised questions about the scope of the document production on August 23rd, Respondents' counsel advised us that the production was not complete and that other boxes would be forthcoming. On August 31, 2004, Complaint Counsel Laureen Kapin, Joshua Millard, Robin Richardson, and Laura Schneider conferred via phone with Respondents' Counsel Jeffrey Feldman, Richard Burbidge, and Ronald Price. In that discussion, further agreements were reached. The parties continued to discuss, among other things, the discovery requests that are the subject of the present *Motion*. On September 1, 2004, counsel continued this conference. Pro se Respondent Mitchell K. Friedlander was not available to join the aforementioned phone conferences. At no time during these conferences did Respondents declare an impasse with respect to the requests that are the subject of our *Motion*.

3) Letters from Complaint Counsel and Ongoing Production with No Declaration of Impasse. On September 2, 2004, Complaint Counsel Laureen Kapin sent opposing counsel a letter clarifying Interrogatories 5, 6, 9, and describing in detail how Respondents failed to fully answer Interrogatories 1 and 2. This letter also discussed other issues, most significantly, the fact that Respondents had not produced the contents of numerous bins containing responsive documents retained by Respondents. This letter did not purport to cover all of Complaint Counsel's issues with Respondents' discovery responses. *See* Ex. U. For example, Complaint Counsel had previously discussed Respondents' failure to respond to Interrogatory 7 in the preceding telephone conferences with Respondents' Counsel.

On September 8, 2004, Complaint Counsel Laura Schneider and Robin Richardson conferred over the telephone with pro se Respondent Mitchell K. Friedlander. Through that conversation, Complaint Counsel and Mr. Friedlander were able to reach agreement on all outstanding issues and Mr. Friedlander agreed to supplement his initial response.

On September 9th, Complaint Counsel received approximately 5,000 pages of documents from Respondents. On September 22, 2004, after the staff concluded its initial review of this supplemental production, Complaint Counsel Joshua Millard sent a letter to Respondents' Counsel discussing our concerns with the discovery responses to date. This letter identified many of the concerns expressed in our *Motion*. It did not, however, purport to cover all of Complaint Counsel's issues with Respondents' discovery responses. *See* Ex. E.

4) Letter from Respondents' Counsel and Continuation of Respondent's Protracted Production with No Declaration of Impasse. Respondents' Counsel were not available to fully discuss Complaint Counsel's September 22, 2004 letter for some time. On September 30, 2004, Complaint Counsel Laureen Kapin and Joshua Millard conferred over the telephone with Respondents' Counsel Jeffrey Feldman and other opposing counsel. Thereafter, on October 8, 2004, Respondents' Counsel Jeffrey Feldman sent Complaint Counsel a letter in response to the September 22, 2004 letter.

Nowhere in this letter did Respondents declare an impasse with respect to negotiations on the requests that are the subject of the present *Motion*. The October 8th response did not declare an impasse. It acknowledged that Respondents had not yet produced withheld documents contained in garbage bins. This letter made further commitments and representations with respect to many of our discovery requests:

With respect to Document Request 2, Respondents pledged to produce all final radio ads. (As discussed in the *Motion*, Complaint Counsel later learned that this was not done.) Further, Respondents reported that all "available" Internet content and emails were provided. (As discussed in the *Motion*, Complaint Counsel later uncovered evidence demonstrating that this was not done either.) Respondents further represented that draft ads would be in the bins, which Respondents counsel pledged to produce by the end of October. (As discussed in the *Motion*, the bin documents were not produced until mid-November, and exceedingly few drafts were turned over at that time.) No impasse was stated with respect to negotiations on this request.

With respect to Document Request 3, Respondents did not clearly address this request. No impasse was stated with respect to negotiations on this request. With respect to Document Request 6, Respondents advised that no additional materials had been located. This response did

not address our objection to the scope of the search for documents. No impasse was stated with respect to our request or our underlying concerns with the scope of the search for documents. (As discussed in the *Motion*, Complaint Counsel have evidence, obtained after October 8th, suggesting that other responsive documents exist.) With respect to Document Request 7, Respondents advised that all responsive documents were produced. Again, this response did not address our objection to the scope of the search for documents. No impasse was stated with respect to our request or our concerns with the scope of the search for documents.

With respect to Document Request 11, Respondents incorrectly stated that the parties agreed that this request is inapplicable to Corporate Respondents. During the October 7th phone conference, Complaint Counsel actually stated that Document Request 11 called for documents relating to firms partially owned, managed, or controlled by Respondents Gay, Mowrey, and Friedlander. Respondents took this to mean that no response was required from the Corporate Respondents, in contradiction to the express text of the *Document Request*, which seeks a response from each Respondent. Complaint Counsel later verbally advised Respondents' Counsel of this error. The parties disagree about the course of negotiations on Document Request 11. However, the October 8th letter does not state that an impasse was stated with respect to this request.

With respect to Interrogatory 1, Respondents agreed to provide a supplemental response. We did not receive this response in the intervening weeks between the October 8th letter and our *Motion*. Additionally, with respect to Interrogatory 2, Respondents provided some additional information without fully answering the Interrogatory as written. No impasse was declared with respect to negotiations on the rest of the Interrogatory. Finally, with respect to Interrogatories 6, 7, and 9, Respondents did not address these requests. No impasses were declared with respect to these Interrogatories.

With many discovery issues thus left unresolved, with no declarations of impasse, and with Complaint Counsel awaiting further documents and information from Respondents, the parties continued their discovery discussions following this exchange.

5) Email from Complaint Counsel and Continuation of Respondents' Protracted Production. On October 25, 2004, Complaint Counsel Laura Schneider contacted Respondents' Counsel Chris Demetriades via email to identify and discuss outstanding discovery issues. *See* Ex. V. This email does not purport to cover all of the outstanding discovery issues that existed at this point, but it specifically identified many Document Requests and Interrogatories as requiring further discussion. This email provides further evidence that, after the October 8th letter from Respondents' Counsel, the parties continued to engage in good faith negotiations concerning the requests that are the subject of this *Motion*.

On October 27, 2004, Complaint Counsel received another document production from Respondents. Thereafter, on October 29, 2004, Complaint Counsel Laureen Kapin and Respondents' Counsel Jeffrey Feldman discussed several discovery issues including the status of the withheld bin documents. At no time during these telephone calls did Respondents declare an impasse with respect to discovery requests that are the subject of this *Motion*.

6) Further Negotiations and Communications with No Declaration of Impasse, as Respondents' Production Continues into its Fourth Month. On November 3, 2004, Complaint Counsel Lauren Kapin discussed the heavily redacted emails and documents produced in discovery with Respondents' Counsel Jeffrey Feldman. Thereafter, on November 5, 2004, Complaint Counsel Lauren Kapin emailed and wrote Respondents' Counsel, at their request, to identify the promotional materials that were the subject of Interrogatory 1. *See* Ex. V. On November 11, 2004, Complaint Counsel Lauren Kapin again emailed Respondents' Counsel Jeffrey Feldman to inquire about the status of the outstanding bin documents, which Respondents had previously pledged to produce by the end of October. On November 9, 2004, Complaint Counsel Lauren Kapin and Joshua Millard and Respondents' Counsel Jeffrey Feldman conferred by telephone. Later, in mid-November, Complaint Counsel Laura Schneider and Joshua Millard and Respondents' Counsel Jeffrey Feldman conferred by telephone. Respondents' Counsel stated that Respondents believed that they had inadvertently withheld non-privileged documents and might produce such documents after further review by counsel.

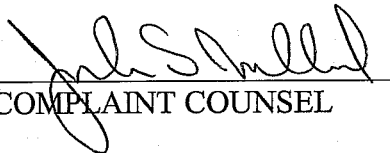
On or about November 16th and November 18th, Complaint Counsel received additional documents from Respondents. The second of these two productions contained the long-promised bin documents—over 10,000 documents in total. *See* Ex. D. This production required several weeks for review for compliance with our discovery requests.

On November 22, 2004, Complaint Counsel Joshua Millard contacted Respondents' Counsel Jeffrey Feldman by email to request the production of the radio ads referenced in this document production, which are further described in the attached *Motion*.

7) Concluding Negotiations and Declaration of Impasse. On November 29, 2004, Complaint Counsel Lauren Kapin and Joshua Millard and Respondents' Counsel Jeffrey Feldman discussed numerous issues with Respondents' responses to our initial requests. Respondents' Counsel represented, for the first time to the recollection of Complaint Counsel, that an impasse existed with respect to our initial requests, stretching back over a month, to the October 8th letter from Respondents. During this telephone conference, Respondents' Counsel also acknowledged that Respondents had not yet completed their production in response to our first discovery requests.

Two days later, on December 1, 2004, Complaint Counsel advised Respondents' Counsel in writing that it would not continue to wait for the production of documents and information in response to our initial discovery requests, to our own prejudice, when Respondents dragged out their document production and intended to represent that any *Motion to Compel* related to those requests was late. Complaint Counsel allowed Respondents until this Monday, December 6, 2004, at 12pm, five days after Respondents' suggestion of impasse, to submit documents and information in response to our requests, which were issued five months ago. No materials were submitted in response.

Complaint Counsel repeatedly conferred with Respondents' Counsel and made extensive efforts to obtain complete responses to *Document Requests* 2, 3, 6, 7, and 11, and *Interrogatories* 1, 2, 6, 7, and 9. These efforts should not be held against Complaint Counsel. Respondents' contention that the attached Motion is untimely has no merit in light of their indisputably protracted production of documents and answers to interrogatories, Complaint Counsel's extended negotiations with Respondents' Counsel, Respondents' failure to conclude their discovery response, and Respondents' failure to advise Complaint Counsel of an impasse in negotiations before last week, among other factors.


COMPLAINT COUNSEL 12/06/04

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2004, I caused *Complaint Counsel's Motion to Compel Production of Documentary Materials and Answers to Interrogatories* to be served and filed:

- (1) the original, and one paper copy filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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(801) 517-7108 (fax)
Respondent Pro Se
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COMPLAINT COUNSEL

**ATTACHED EXHIBITS TO
COMPLAINT COUNSEL'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTARY MATERIALS
AND ANSWERS TO INTERROGATORIES**

- Exhibit A - Letter from Stephen Nagin to Walter C. Gross (Apr. 28, 2002) and Letter from Associate Director Elaine D. Kolish to Stephen Nagin (May 3, 2002)
- Exhibit B - Compl. Counsel's 1st Req. for Prod. of Doc. Materials and Tangible Things (June 25, 2004)
- Exhibit C - Compl. Counsel's 1st Set of Interrogatories (June 25, 2004)
- Exhibit D - Cover of Respts' CDROM production (dated Nov. 16, 2004) and Resp'ts' Resp. to 1st Req. for Prod. (Aug. 3, 2004)
- Exhibit E - Letter from Compl. Counsel to Respondents' Counsel (Sept. 22, 2004) (attachments omitted)
- Exhibit F - Examples of Resubmitted Substantiation (front pages of Johannes Prins et al., *Regulation of Adipose Cell Number in Man*, 92 J. CLINICAL SCI. 3-11 (1997)); and Excerpt of line-item refund data
- Exhibit G - Letter from Respondents' Counsel to Compl. Counsel (Oct. 8, 2004)
- Exhibit H - Examples of Redacted Emails and Original Consumer Complaints
- Exhibit I - *In re Natural Organics, Inc.*, Docket No. 9294, 2001 FTC LEXIS 31 (Mar. 15, 2001)
- Exhibit J - Examples of "Imaged" Ads
- Exhibit K - Email, R42202 (discussing radio ads *not* produced in discovery)
- Exhibit L - Emails, R42560 and R41903 (referring to promotional emails and online streaming for Leptoprin emails *not* produced in discovery)
- Exhibit M - Resp'ts' Initial Disclosures (Aug. 10, 2004)
- Exhibit N - Email from mjstc.net, F790 (referring to Anorex advertisements *not* produced in discovery); Registration for "mjstc.net"; Letter Responses to Subpoenas Duces Tecum to Western Holdings and Majestic Enterprises; Letter Identifying Identity of Paralegal
- Exhibit O - Excerpts from Internet websites and website-based message boards *not* produced in discovery
- Exhibit P - Examples of emails from Respondents or their agents before August 4, 2003, and other emails *not* produced by Respondents in discovery (marked with SDT Bates numbers)
- Exhibit Q - printout, flyingpoint media.com (referring to "marketing plan" developed by firm for Basic Research)
- Exhibit R - Gross sales of challenged products
- Exhibit S - Excerpt of Dermalin-APg Information Communication Study (2002)
- Exhibit T - Resp'ts' Resp. to 1st Set of Interrogs. (Aug. 16, 2004) (attachment omitted)
- Exhibit U - Letter from Complaint Counsel to Respondents' Counsel at 2 (Sept. 2, 2004)
- Exhibit V - Email to Respondent's Counsel (Oct. 25, 2004); Letter to Respondent's Counsel (Nov. 5, 2004); and Email to Respondent's Counsel (Dec. 1, 2004)
- Exhibit W - Robert Gehrke, *2d Congressional District Candidate Says Basic Research's Legal Filing Must Be a Mistake*, SALT LAKE TRIBUNE at A1 (Sept. 4, 2004)

EXHIBIT A

The following letter from Stephen E. Nagin, Esq., dated April 28, 2002, appears in its original form. Redacted from this document are handwritten notations made by Complaint Counsel constituting or reflecting their own deliberative process and work product, which are privileged and exempt from disclosure.

NAGIN GALLOP FIGUEREDO^{PA}

Attorneys & Counselors

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CONFIDENTIAL

VIA FACSIMILE

Sunday, April 28, 2002

Walter C. Gross
Room S-4302
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580.
Facsimile Number: (202) 326-2559

Re: *Civil Investigative Demands for Documentary Materials and for
Written Interrogatories and Report from Basic Research, L.L.C.,
dated February 13, 2002, Pursuant to Resolutions dated April 9,
1990 and May 3, 2000: Request for modification of the CID
Instructions and Specifications concerning shredding of documents*

Dear Walter:

This letter confirms the discussions between us on Thursday, April 25, 2002. It has been brought to the attention of undersigned counsel (while at the office of Basic Research, LLC, supervising anticipated compliance with the above-referenced CIDs), that the cessation of normal and routine shredding of trash has necessitated temporary storage of a considerable quantity of material, which will fill up several locked dumpsters. Compliance with FTC staff's demand for a cessation of shredding presents a hardship for Basic Research, LLC.

The company routinely enters all critical information into its electronic database, backs-up the data, and shreds hard copies of that data to avoid potential commercial espionage and to protect the privacy of customer information. Compliance with the FTC staff's request for cessation of routine shredding has caused additional expense, added

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Walter C. Gross
Federal Trade Commission
April 28, 2002
Page 2 of 4

burdens, and is creating a build-up of trash that must be maintained in locked dumpsters. That trash will need to be disposed of. Anticipating the necessity to dispose of this trash in a secure manner, Basic Research, LLC, has inquired of undersigned counsel whether filled dumpsters should be sent to your office. This concern prompted the discussion between us about modifying compliance with the CIDs to accommodate legitimate concerns about security of confidential information, yet permit resumption of shredding of materials irrelevant to the FTC staff's non-public investigation. To accommodate the request for modification of the CIDs, you have requested a list of the types of materials that otherwise would be shredded in routine course.

Without waiving any objections or privileges that may be applicable, what follows is the list that you requested. This information solely is provided to enable FTC staff to better focus the CID demands and to avoid the necessity for Basic Research, LLC, to petition the Commission for relief from the existing, unnecessarily harsh anti-shredding requirements set forth in the CIDs.

For ease of reference – and to better enable FTC staff to significantly limit the categories of documents for which the temporary cessation of shredding has been requested – the following categories of documents are listed in alphabetical order by the functional areas of the company at which shredding bins are maintained. It should be kept in mind that most information (and certainly all critical information) is stored electronically. Consequently, maintenance of the following written materials should be unnecessary.

1. The *Accounting* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: financial statements, MAS200 financial reports, pay rates, social security numbers, customer identifying information, duplicate invoices, employee information, vendor statements, spreadsheets, and hard copies of reports.
2. The *Administration* routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: employee product orders, interoffice messages, Office Depot supply orders, and flight or other travel information.
3. The *Business Development* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: electronic mail, facsimiles, customer orders, sales totals, and invoices.

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Walter C. Gross
Federal Trade Commission
April 28, 2002
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4. The *Consumer* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: order forms, invoices, customer credit card numbers, Federal Express information, and general notes made in routine course.
5. The *Customer Service* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: sales order reports, and customer lists.
6. The *Information Technology* ("IT") department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: the IT codes.
7. The *Legal* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: domain names, trademarks, product formulas, advertisements, correspondence (e-mails printed out), accounting of exclusivities, pleadings, deposition transcripts (or portions of same), declarations, affidavits, etc.
8. The *Marketing* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: general notes made in routine course, extra copies of advertisements, drafts of advertisements, product literature, and labels; outdated advertisements; and miscellaneous handwritten notes.
9. The *Operations* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: reports and credit card numbers.
10. The *Purchasing* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: purchase orders, MRP generations, old formulations, old C of A's, old purchasing agreements, facsimiles, and hard copies of electronic mail.

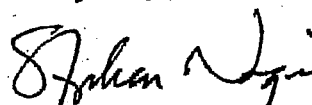
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April 28, 2002
Page 4 of 4

11. The *Shipping* department routinely has disposed of the following documents (typically brief handwritten notations made during telephone calls, or interoffice hard copies of information maintained on the computer system) relating to: picking tickets, electronic mail, and any item with customer identification numbers.

Your earliest response would be greatly appreciated.

Very truly yours,


Stephen E. Nagin



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20580

Division of Enforcement
Bureau of Consumer Protection

May 3, 2002

VIA FAX
305-854-5351

Stephen Nagin, Esq.
Nagin, Gallop, Figueredo
3225 Aviation Ave. - Third Floor
Miami, FL 33133-4741

Re: Basic Research, L.L.C. File No. 0023300

Dear Mr. Nagin:

This letter is in response to your letter of April 28, 2002, in which you seek relief from the instruction relating to "Document Retention" in the CIDs for Documentary Materials and Written Interrogatories issued by the FTC to your client in the above referenced matter. Specifically, you seek clarification as whether your client needs to retain certain documents that it routinely destroys at the close of each business day, particularly since you allege that all "critical" information contained in such documents is retained in the client's electronic database.

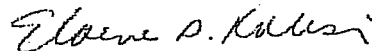
Based on the information you provided, and provided that all the information contained in the documents is preserved electronically and backed up to prevent loss due to computer "crashes," there are certain categories of such documents that we believe it is unnecessary to retain. Other categories, however, should be retained pending the investigation, and we require more information as to other document types before we can determine whether your client needs to retain them. Further, any non-identical copies of documents where information has not been entered into your database must be retained for the time being. We can discuss these documents in more detail if you wish to do so. Please see the list below, which uses the same numbers and categories that you used in your letter.

1. Accounting Department documents: Based on the information in your letter, we do not object to the routine destruction of the documents listed in this category.
2. Administration documents: Based on the information in your letter, we do not object to the routine destruction of all documents described in this category except those relating to interoffice messages, which you must retain.
3. Business Development Department: Your client must retain all documents in this category.

4. Consumer Department: With the exception of order forms, invoices, and general notes made in the routine course, and based upon the information contained in your letter, we do not object to the routine destruction of documents listed in this category. We require more information as to the other three types of documents, *i.e.*, what kind of information is usually contained in documents that pertain to order forms or invoices; what is typically contained in documents that fall into the "general notes" category; and what is the information your client would consider "critical" for these types of documents.
5. Customer Service Department documents: These documents must be retained by your client.
6. Information Technology Department documents: We have no objection to the routine destruction of documents listed in this category.
7. Legal Department documents: To the extent that these documents are protected by the attorney client privilege or constitute attorney work product, we do not object to their destruction. We reiterate, however, that our determination is based upon the assurance contained in your letter that all pertinent information in this category and all other categories is preserved electronically and backed up.
8. Marketing Department documents: Your client must not dispose of these documents.
9. Operations Department documents: Based on the information you have provided, we have no objection to the routine destruction of documents relating to credit card numbers, but we need more information as to what you mean by "reports," *e.g.*, what kind of reports do these documents pertain to; what is their purpose, what information in these documents does your client deem to be "critical?"
10. Purchasing Department documents: We need more information about what constitutes documents that refer to "old purchasing agreements" and the type of information that your client would consider "critical" in these documents. Otherwise, we have no objection to the routine destruction of the remaining documents listed in this category.
11. Shipping Department documents: We have no objection to the routine destruction of documents listed in this category.

Please call Walter Gross at 202-326-3319 if you have questions or require additional clarification.

Yours very truly,



Elaine D. Kolish
Associate Director

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)
)
)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)

Respondents.)
)
)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION
OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS**

Pursuant to RULE OF PRACTICE 3.37(a), Complaint Counsel requests that Respondents produce the documentary materials and tangible things identified below for inspection and copying within 20 days at the Federal Trade Commission, 601 New Jersey Ave., N.W., Suite NJ-2122, Washington, D.C. 20001, or at such time and place as may be agreed upon by all counsel.

DEFINITIONS

- 1) "All documents" means each document, as defined below, which can be located, discovered or obtained by reasonable, diligent efforts, **including** without limitation all documents possessed by: (a) you or your counsel; or (b) any other person or entity from whom you can obtain such documents by request or which you have a legal right to bring within your possession by demand.
- 2) "Challenged products" means the products identified as Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean in the administrative Complaint issued by the Federal Trade Commission in the above-captioned matter, both individually and collectively.

- 3) **"Communication(s)"** includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person, by telephone, or electronically, as well as all letters, memoranda, telegrams, cables, and other writings or documents.
- 4) **"Complaint"** means the administrative **Complaint** issued by the Federal Trade Commission, and any amendments thereto, in the above-captioned matter.
- 5) **"Corporate Respondents"** means Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker USA, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., BAN, L.L.C., both individually and collectively, **including** all of their operations under assumed names. This term also includes the entity known as American Phytotherapy Research Laboratory identified in the administrative **Complaint** issued by the Federal Trade Commission.
- 6) **"Dissemination schedule"** includes, but is not limited to, the following: (a) for radio, audio, television, and video **promotional materials**, the date, time of day, location and station name; (b) for product packaging, the names of distributors and retailers to whom the packaging or other **promotional material** was transmitted, the date of transmittal, and the number of pieces transmitted; (c) for printed **promotional materials**, the name and date of the publication or place in which the **promotional material** appeared; and (d) for Internet materials, the date that the **promotional material** was first placed on the Internet, the date (if any) that it was removed from the Internet, and the number of "hits" that the advertisement registered.
- 7) **"Document"** means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, **including** but not limited to any advertisement, book, pamphlet, periodical, contract, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, package insert, sticker, web page, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, data compilation, tests, reports, clinical studies, test reports, scientific literature, articles, expert opinions, handwritten notes, correspondence, **communications**, electronic mail, electronically stored data, computer (**including** handheld computer) material (**including** print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form), and video and audio recordings.
- 8) **"Each"** and **"any"** include **"all,"** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or documents that might otherwise be construed to be outside its scope.

- 9) “**Includes**” or “**including**” means “**including but not limited to,**” so as to avoid excluding any information that might otherwise be construed to be within the scope of any Specification.
- 10) “**Individual Respondents**” means Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively.
- 11) “**Interrogatories**” means any and all *Interrogatories* served on the **Respondents** in the above-captioned matter.
- 12) “**Market research**” means all information referring or relating to testing, measuring or assessing consumers’ or individuals’ interpretation of, understanding of or reaction to a draft, proposed, or final **promotional material**, proposed advertising text, copy or creative strategy or platform, product category, product, entity or information conveyed in an advertisement, **including** consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, focus groups and media research.
- 13) “**Or**” includes “**and,**” and “**and**” includes “**or,**” so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information or **documents** that might otherwise be construed to be outside its scope.
- 14) “**Person**” or “**Persons**” means all natural persons, corporations, partnerships or other business associations, and all other legal entities, **including** all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.
- 15) “**Promotional material**” shall mean any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, sticker, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script used to make oral solicitations to consumers, or publication or broadcast in any other medium.
- 16) “**Referring to**” or “**relating to**” means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- 17) “**Respondent(s)**” means all **Corporate Respondents** and all **Individual Respondents**, both individually and collectively.
- 18) “**You**” or “**Your**” means the Respondents or Respondents’, both individually and collectively, unless otherwise noted.

- 19) The use of the singular includes the plural, and the plural includes the singular.
- 20) The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- 21) The spelling of a name shall be construed to include all similar variants thereof.

INSTRUCTIONS

- 1) Unless otherwise specified, the time period covered by a Document Specification shall not be limited and all **documents** responsive to the Specification, regardless of dates or time periods involved, should be provided.
- 2) A complete copy of each **document** should be submitted even if only a portion of the **document** is within the terms of the Specification. The **document** shall not be edited, cut, or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- 3) All information submitted shall be clearly and precisely identified as to the Specification(s) or sub-Specification(s) to which it is responsive. Each page submitted should be marked with a unique "Bates" **document** tracking number.
- 4) **Documents** covered by these Specifications are those which are in your possession or under your actual or constructive custody or control, and in the case of **Corporate Respondents**, includes all of their operations under assumed names, whether or not such **documents** were received from or disseminated to any other **person** or entity **including** attorneys, accountants, directors, officers and employees.
- 5) All information submitted shall be clearly and precisely identified as to the **Respondent(s)** who produced the information. You shall do so by: (a) marking each submitted item with a notation identifying the **Respondent(s)** who produced that item; or (b) providing a separate list of submitted items, in numeric "Bates" **document** tracking number order, that identifies the **Respondent(s)** who produced each item.
- 6) **Documents** that may be responsive to more than one Specification need not be submitted more than once; however, your response should indicate, for each **document** submitted, each Specification to which the **document** is responsive. If any **documents** responsive to a Specification have been previously supplied to the Commission, you may comply with the Specification by identifying the **document(s)** previously provided and the date of submission; identification shall be by Bates number if the **document(s)** were so numbered when submitted, or by author and subject matter if not so numbered.

- 7) If any of the documentary materials requested in these Specifications are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the record(s) involved. If the information requested is stored in a computer or a file or record generated by a computer, indicate whether you have an existing program that will print out the record in readable form and state the name, title, business address and telephone number of each **person** who is familiar with the program.
- 8) **Promotional materials** submitted in response to these Specifications shall be submitted in the following form(s) as follows: For **documents**, provide the original **promotional materials** if available, or, if not available, color copies thereof. For audio-only (or radio) materials, provide a tape cassette (or digitized recording, if in machine-readable form) and a script, as well as any audio out-takes. For video recordings, provide a DVD or VHS cassette and script or storyboard, as well as any video out-takes. For Internet or other online materials, provide a CD (if in machine-readable form) or a clear color printout of all screens displayed in the promotional materials and identify the site, forum, or address.
- 9) All objections to these Document Specifications, or to any individual Specification, must be raised in the initial response or are otherwise waived.
- 10) If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive **document** is privileged, all non-privileged portions of the **document** must be submitted.
- 11) This First Request for Production of Documentary Materials and Tangible Things is continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery. Further instructions pertinent to a particular Document Specification appear in parentheses within or following that Specification.

SPECIFICATIONS

Demand is hereby made for the following documentary materials and tangible things:

- 1) Two complete packages, **including** the product contained therein, of each of the **challenged products**. (If any product has been reformulated, provide two complete packages, **including** the product contained therein and all packaging inserts, of each version of the product that has been marketed and sold).

- 2) All **promotional materials** for the **challenged products**, whether in draft or final form.
- 3) All **documents and communications referring or relating to draft or final promotional materials** for the **challenged products**. (This request **includes** but is not limited to contracts, **documents**, and **communications** evidencing the creation, modification, approval, execution, evaluation, dissemination, clearance, or placement of **promotional materials**, and **documents referring or relating to** the contents of draft or final **promotional materials**, **including** but not limited to any claims, messages, or communication in any draft or final **promotional material(s)**.)
- 4) All **documents and communications referring or relating to** the efficacy of the **challenged products** or their ingredients (**including** but not limited to tests, reports, studies, scientific literature, written opinions, and any other **documents referring or relating to** the amount, type, or quality of testing or substantiation) that are relied upon as substantiation of efficacy claims or that tend to refute efficacy claims in **promotional materials** for any of the **challenged products**, **including** the claims alleged in the Complaint (§§ 14, 17, 20, 23, 25, 28, 31, 33, 37, 40, and 42) regardless of whether you contest that those claims were made.
- 5) All **documents and communications referring or relating to** the duties, responsibilities, and work performed by each of the **Respondents** with respect to the advertising, marketing, promotion, and sale of each of the **challenged products**.
- 6) All **documents and communications referring or relating to** the marketing of each of the **challenged products**. (This request **includes** but is not limited to **market research**, marketing plans or strategies, and all other **document(s)** and **communications referring or relating to** copy tests, marketing or consumer surveys and reports, penetration tests, target audiences, recall tests, audience reaction tests, communications tests, consumer perception of any **promotional materials** for any of the **challenged products**.)
- 7) All **documents and communications referring or relating to** persons who are depicted, named, or quoted in **promotional materials** for each of the **challenged products**. (This request **includes** but is not limited to **documents and communications** referencing endorsers and testimonialists and **documents** identifying the contact information for all **persons** depicted, named, or quoted in those **promotional materials**.)
- 8) All **documents and communications referring or relating to** complaints or investigations of any of the **challenged products** or their **promotional materials**. (This request **includes** but is not limited to **documents and communications relating to** lawsuits, demand letters, refund requests, warranty or guarantee claims, and complaints or inquiries by local, state, or federal regulators (**including** the U.S. Food and Drug Administration) or other **persons** (**including** but not limited to consumers, competitors, and entities such as the Better Business Bureau or the National Advertising Division).

9) **All documents relating to, referring to, or constituting a dissemination schedule for advertisements relating to the challenged products.**

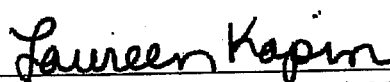
10) All tax returns for **Respondents** for 2000 to present, **including** but not limited to all supporting **documents** and attachments, requests for extension for filing any tax return, and any statement(s) of the reasons for which any extension(s) were requested. (This request **includes** all returns and related information pertaining to the payment of payroll and unemployment taxes, social security taxes, medicare, and federal, state and local and sales, business, gross receipts, licensing, property, and income taxes.)

11) **All documents** relating to the corporate structure of each company for which any individual **Respondent** is an officer, director or significant shareholder (25% or more of total shares), including but not limited to Articles of Incorporation; By-laws; Board minutes; annual reports; information showing the date and place of the formation of the Company, and the form of organization of your Company (for example, corporation or partnership); parent organization, if any, and all subsidiaries and affiliates; annual or periodic filings with State or Federal authorities regulating corporations; the names of all directors; the name and title of all officers, supervisors, and managers; organizational charts; **Documents** showing the ownership interests of all owners; **Documents** describing the duties, responsibilities and authority of all officers, managers, directors, and supervisors employed by **you**; and any Documents delegating authority to engage in any act on behalf of **you** or act as agent for **you**.

12) Annually, from the date of the first sale of each of the **challenged products** to date, **all documents** that show net and gross sales figures and profit figures for each of the **challenged products**.

13) **All documents and communications** consulted or used in preparing your responses to Complaint Counsel's **interrogatories**.

Respectfully submitted,


Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
Laura Schneider (202) 326-2604

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: June 25 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2004, I caused *Complaint Counsel's First Request for Production of Documentary Materials and Tangible Things* to be served as follows:

- (1) one (1) electronic copy via email and one (1) copy via first class U.S. Mail to:

Mary L. Azcuenaga, Esq.
Heller, Ehrman, White & McAuliffe, L.L.P.
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
mazcuenaga@hewm.com

Stephen E. Nagin, Esq.
Nagin Gallop Figuero P.A.
3225 Aviation Ave.
Miami, FL 33133
snagin@ngf-law.com

- (2) one (1) copy via first class U.S. Mail to:

Basic Research, L.L.C.
A.G. Waterhouse, L.L.C.
Klein-Becker USA, L.L.C.
Nutrasport, L.L.C.
Sovage Dermallogic Laboratories, L.L.C.
BAN, L.L.C.
Dennis Gay
Daniel B. Mowrey
Mitchell K. Friedlander
5742 W. Harold Gatty Dr.
Salt Lake City, UT 84116

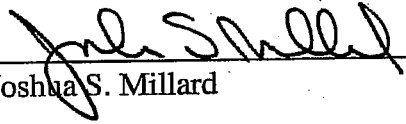

Joshua S. Millard

EXHIBIT C

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC
LABORATORIES, L.L.C.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,**

Respondents.

Docket No. 9318

PUBLIC DOCUMENT

COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES

Pursuant to RULE OF PRACTICE 3.35, Complaint Counsel requests that Respondents respond to these Interrogatories within 30 days and furnish the requested information to Complaint Counsel at the Federal Trade Commission, 601 New Jersey Ave., N.W., Suite NJ-2122, Washington, D.C. 20001, or at such time and place as may be agreed upon by all counsel.

DEFINITIONS

- 1) **"Challenged products"** means the products identified as Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean in the administrative complaint issued by the Federal Trade Commission in the above-captioned matter, both individually and collectively.
- 2) **"Communication(s)"** includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person, by telephone, or electronically, as well as all letters, memoranda, telegrams, cables, and other writings or documents.
- 3) **"Corporate Respondents"** means Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker USA, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic

Laboratories, L.L.C., BAN, L.L.C., both individually and collectively, and **including** all of their operations under assumed names. This term also includes the entity known as American Phytotherapy Research Laboratory identified in the administrative complaint issued by the Federal Trade Commission.

4) **"Describe"** or **"disclose"** mean to offer a comprehensive, complete, accurate and detailed description, explanation or listing of the matter into which the Interrogatory inquires.

5) **"Dissemination schedule"** includes, but is not limited to, the following: (a) for radio, audio, television, and video **promotional materials**, the date, time of day, location and station name; (b) for product packaging, the names of distributors and retailers to whom the packaging or other **promotional material** was transmitted, the date of transmittal, and the number of pieces transmitted; (c) for printed **promotional materials**, the name and date of the publication or place in which the **promotional material** appeared; and (d) for Internet materials, the date that the **promotional material** was first placed on the Internet, the date (if any) that it was removed from the Internet, and the number of "hits" that the advertisement registered.

6) **"Document"** means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, package insert, sticker, web page, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, data compilation, tests, reports, clinical studies, test reports, scientific literature, articles, expert opinions, handwritten notes, correspondence, **communications**, electronic mail, electronically stored data, computer (including handheld computer) material (including print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form), and video and audio recordings.

7) **"Each"** and **"any"** include **"all,"** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or **documents** that might otherwise be construed to be outside its scope.

8) **"Identify"** or **"identification"** means:

(a) when referring to a natural **person**, state the full name, present business address and telephone number, or if a present business affiliation or business address is not known, by the last known business and home addresses and business and home telephone numbers;

(b) when referring to any other entity, such as a business or organization, state

the legal name as well as any other names under which the entity has done business, address, telephone number and contact person, if applicable for that entity; and

©) when referring to a **document** or **communication**, state the full name(s) of the author(s) or preparer(s), the full name of the recipient(s), addressee(s), and/or person(s) designated to receive copies, the title or subject line of the **document** or **communication**, a brief description of the subject matter of the **document** or **communication**, the date it was prepared, its present location, and its present custodian.

9) **"Includes"** or **"including"** means **"including but not limited to,"** so as to avoid excluding any information that might otherwise be construed to be within the scope of any Specification.

10) **"Individual Respondents"** means Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively.

11) **"Or"** includes **"and,"** and **"and"** includes **"or,"** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information or documents that might otherwise be construed to be outside its scope.

12) **"Person"** or **"Persons"** means all natural persons, corporations, partnerships or other business associations, and all other legal entities, including all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.

13) **"Promotional material"** shall mean any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, stickers, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script used to make oral solicitations to consumers, or publication or broadcast in any other medium.

14) **"Referring to"** or **"relating to"** means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

15) **"Requests for Production"** means any and all *Requests for Production of Documentary Materials and Tangible Things* directed to the **Respondents** in the above-captioned matter.

- 16) **"Respondent(s)"** means all **Corporate Respondents** and all **Individual Respondents**, both individually and collectively.
- 17) **"Substantially similar product"** means any product that is substantially similar in ingredients, composition, and properties.
- 18) **"You" or "Your"** means the Respondents or Respondents', both individually and collectively, unless otherwise noted.
- 19) The use of the singular includes the plural, and the plural includes the singular.
- 20) The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- 21) The spelling of a name shall be construed to include all similar variants thereof.

INSTRUCTIONS

- 1) Unless otherwise specified, the time period covered by an Interrogatory shall not be limited and all information responsive to the Interrogatory, regardless of dates or time periods involved, shall be provided.
- 2) Each Interrogatory should be set forth in full preceding the answer to it and should be answered separately and fully in writing, under oath.
- 3) All answers shall be served within 30 days after service of these Interrogatories.
- 4) Information covered by these Interrogatories is that which is in your knowledge or possession, or under your actual or constructive custody or control, whether or not such information is located in the files of, or possessed by your individual officers, directors or employees, and whether or not such information is received from or disseminated to any other **person** or entity including attorneys, accountants, directors, officers or employees.
- 5) All information submitted in response to these Interrogatories shall be clearly and precisely identified as to the **Respondent(s)** who produced the information.
- 6) Where an Interrogatory requests an answer or portion of an answer that has already been supplied in response to another Interrogatory, the answer or portion of the answer need not be supplied a second time. It is sufficient to specify the responses that contain the answer, and supply any additional information necessary to answer the Interrogatory.
- 7) All objections to these Interrogatories, or to any individual Interrogatory, must be raised in the initial response or are otherwise waived.

8) If you object to any Interrogatory or a part of any Interrogatory, state the Interrogatory or part to which you object, state the exact nature of the objection, and describe in detail the facts upon which you base your objection. If any Interrogatory cannot be answered in full, it shall be answered to the fullest extent possible and the reasons for the inability to answer fully shall be provided. If you object to any Interrogatory on the grounds of relevance or overbreadth, you shall provide all responsive information that is concededly relevant to the parties' claims or defenses or the requested relief. For each Interrogatory that cannot be answered in full, you shall describe the efforts made to locate information needed for such answer.

9) If any **documents** or **communications** are not identified in response to an Interrogatory on grounds of privilege, submit together with such claim a schedule of the items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive **document** or **communication** is privileged, all non-privileged portions of the item must be identified.

10) These Interrogatories are continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery. Further instructions pertinent to a particular Interrogatory appear in parentheses within or following that Interrogatory.

INTERROGATORIES

1) **Identify and describe** in detail the current and former duties, responsibilities, or work performed by each **person relating to the promotional materials** for each of the **challenged products**. (This request **includes**, but is not limited to, the creation, development, evaluation, approval, modification, and dissemination of **promotional materials**.)

2) **Identify and describe** in detail the current and former duties, responsibilities, or work performed by each **person** consulted by you, or upon whose advice, opinion, or expertise you relied in the production of each of the **challenged products**. (This request **includes**, but is not limited to, the creation, development, evaluation, approval, and manufacture of the **challenged products**.)

3) **Describe** in detail the composition of each of the **challenged products**. (This request **includes**, but is not limited to, the identity of each ingredient and the amount of each ingredient contained in a single capsule, application, and serving. If any **challenged product** has been reformulated, provide a separate answer for each version of the product that has been marketed and sold, **identifying** the time period(s) in which each version was marketed and sold.)

4) **Disclose** the total amount of sales, in terms of units and dollars, that each Respondent has

achieved for each of the **challenged products** for each year from 2001 to the present.

5) To the extent a **challenged product** is a **substantially similar product** to other products, **identify** each other product.

6) **Disclose** all payments that each **Respondent** has received, directly or indirectly, in connection with the advertising, marketing, promotion, and sale of each of the **challenged products** for each year from 2001 to the present. (This request **includes** the total dollar amount and source for all payments. For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers.)

7) **Disclose** the total amount of dollars that each **Respondent** has spent to advertise, market, or otherwise promote each of the **challenged products** for each year from 2001 to the present, broken down by each medium used (*i.e.*, television, print, Internet, radio, or other means). (This request **includes**, but is not limited to, all expenditures attributable to the creation, development, evaluation, approval, modification, and dissemination of **promotional materials**).

8) Provide a **dissemination schedule** that describes in detail how each item of **promotional material** submitted in response to the **Requests for Production** was disseminated or otherwise exposed to consumers.

9) **Describe** in detail the actions each **Respondent** has taken to comply with the U.S. Food and Drug Administration's prohibition on the sale of dietary supplements containing ephedrine alkaloids, effective April 12, 2004. (This request **includes**, but is not limited to, **identification** of any product formulations that have been created, modified, or removed from distribution, **identification** of any **promotional materials** that have been created, revised, or removed from dissemination, and the date(s) on which all of actions described in your answer took place; and how orders for Leptoprin or Anorex or in response to existing **promotional materials** Leptoprin or Anorex have been fulfilled.)

10) **Disclose** the total amount of refunds to consumers, in terms of units and dollars, that each Respondent has made for each of the **challenged products** for each year from 2001 to the present.

Respectfully submitted,

Laureen Kapin

Laureen Kapin (202) 326-3237

Joshua S. Millard (202) 326-2454

Laura Schneider (202) 326-2604

Division of Enforcement

Bureau of Consumer Protection

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C. 20580

Dated: June 25, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2004, I caused *Complaint Counsel's First Set of Interrogatories* to be served as follows:


- (1) one (1) electronic copy via email and one (1) copy via first class U.S. Mail to:

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- (2) one (1) copy via first class U.S. Mail to:

Basic Research, L.L.C.
A.G. Waterhouse, L.L.C.
Klein-Becker USA, L.L.C.
Nutrasport, L.L.C.
Sovage Dermalogic Laboratories, L.L.C.
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